ALBERTA LAW REFORM INSTITUTE

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# ENFORCEMENT OF JUDGMENTS

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# ABOUT THE ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of ALRI's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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This and other Institute reports are available to view or download at the ALRI website: <*http://www.law.ualberta.ca/alri/*>.

# ACKNOWLEDGMENTS

The basis for this report is three uniform acts prepared by the Uniform Law Conference of Canada. ALRI relied heavily on the various working groups which prepared the uniform acts and Commentaries. They are listed on the ULCC website at <http://www.ulcc.ca/en/us/>.

Within ALRI, two counsel have contributed to this report. Witek Gierulski prepared the background memorandum from which the policy decisions were made. Jamie Dee Larkam updated the Board's work and prepared the Final Report, with the assistance of our student researcher, Jessica Bortnick.

We acknowledge, with gratitude, their contribution and assistance to the Board in making these final recommendations.

# SUMMARY

The law on enforcement of judgments obtained outside Alberta has remained virtually unchanged since the 1920s. At present in Alberta if one wants to enforce a foreign judgment, either Canadian or non-Canadian, one has three options:

1) sue again on the original cause of action in Alberta;
2) sue on the judgment in Alberta on the grounds that the judgment forms the basis of an outstanding obligation owed by the judgment debtor; or
3) where appropriate, register the judgment under the *Reciprocal Enforcement of Judgments Act*, which is only available for certain types of judgments from specific jurisdictions.

The outcome of any of these options, however, is uncertain, as there is no guarantee that the enforcement mechanism chosen will necessarily be successful in any particular case.

In 1990, the Attorneys General and the Ministers of Justice requested that the Uniform Law Conference of Canada develop uniform legislation to provide a modern legal framework for the enforcement of judgments across Canada and the harmonization of the rules of jurisdiction. The work of the ULCC was bolstered by the Supreme Court of Canada's decision in *Morguard Investments Ltd. v. De Savoye*, wherein Justice La Forest writing on behalf of the court held that in a federal state, such as Canada, the courts of one province should not question the assumption of jurisdiction by the courts of another province. The ULCC's work has culminated in three uniform statutes:

- *Uniform Enforcement of Canadian Judgments and Decrees Act*
- *Uniform Enforcement of Foreign Judgments Act*
- *Uniform Court Jurisdiction and Proceedings Transfer Act*

These three uniform acts together create a legislative enforcement regime which, if implemented in Alberta, will encourage businesses operating elsewhere in Canada or the world, to conduct their business within Alberta due to the certainty that almost any judgment obtained from outside Alberta will be recognized by the Alberta courts and enforceable in Alberta.

This Report makes recommendations for Alberta to:

1) Adopt all three Uniform Acts together as a package. The Uniform Acts should include all amendments and local adaptations recommended by ULCC and should incorporate the improvements enacted in other Canadian jurisdictions as noted in this Report.

2) Leave Alberta's reciprocal enforcement legislation in force but amend it to limit the reciprocal enforcement legislation to situations not dealt with by the Uniform Acts.

# RECOMMENDATIONS

# CHAPTER 1. INTRODUCTION

[1] The Civil Section of the Uniform Law Conference of Canada [ULCC] assembles government policy lawyers and analysts, private lawyers and law reformers to consider areas in which provincial and territorial laws would benefit from harmonization. The main work of the Civil Section is reflected in "uniform statutes", which the Section adopts and recommends for enactment by all relevant governments in Canada.

[2] Uniform legislation providing for the reciprocal enforcement of judgments has been a focus for the ULCC almost from the ULCC's inception in 1918. The ULCC adopted and recommended the first *Uniform Reciprocal Enforcement of Judgments Act* in 1924, and a revised version was released in 1958. The intention of the Act was to provide a mechanism by which a judgment from a reciprocating jurisdiction could be enforced as if it were a local judgment. A reciprocating jurisdiction is defined as a place, not necessarily Canadian, that has enacted similar legislation and which has been designated by the government of the enacting province or territory to be a reciprocating jurisdiction. Under the Act, the judgment is registered in the jurisdiction where enforcement is sought. The Act was intended to create a summary method of bringing the judgment to the attention of local courts and provide a quicker and less expensive alternative to enforcing the judgment by action.[1]

[3] In 1990, the Attorneys General and the Ministers of Justice requested that the ULCC develop uniform legislation to provide a modern legal framework for the enforcement of judgments across Canada and the harmonization of the rules of jurisdiction. This new legal framework was intended to replace an unsatisfactory body of common law. The work of the ULCC was bolstered by the Supreme Court of Canada's decision in *Morguard Investments Ltd. v. De Savoye*, which

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[1] Arthur L. Close, "Civil Section Documents - Uniform Reciprocal Enforcement of Judgments Act", *Proceedings of Annual Meetings* (1994; Uniform Law Conference of Canada, Charlottetown, PEI) at 1, online: <http://www.ulcc.ca/en/poam2/index.cfm?sec=1994&sub=1994ac&print=1>.

undeniably changed the common law and made it somewhat less unsatisfactory.[2] Post-*Morguard*, the ULCC has continued with its mandate to create a whole new machinery for the interjurisdictional enforcement of judgments.[3]

[4] In 2000, the ULCC launched its Commercial Law Strategy. The aim of the Commercial Law Strategy is to modernize and harmonize commercial law in Canada, with a view to creating a comprehensive framework of commercial statute law which will make it easier to do business in Canada, resulting in direct benefits to Canadians and the economy as a whole. As part of its Commercial Law Strategy, the Uniform Law Conference of Canada has identified the importance of enforcement law - as without effective enforcement of substantive rights, the rights themselves are less useful to commerce.

[5] In response to the original terms of reference from the Attorneys General and the Ministers of Justice, the ULCC has developed a uniform three-part legislative scheme which encompasses the areas of the enforcement of Canadian judgments and decrees, the enforcement of foreign judgments, and court jurisdiction and proceedings transfer.

[6] The *Uniform Enforcement of Canadian Judgments and Decrees Act* makes a judgment from anywhere in Canada enforceable in a province in the same manner as if it were from a court of that province.[4]

[7] The *Uniform Enforcement of Foreign Judgments Act* applies similar principles to judgments obtained outside Canada, subject to a provincial court's

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[2] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 [*Morguard*].

[3] Arthur L. Close, "Criticism of the Uniform Enforcement of Canadian Judgments Act", *Proceedings of the Seventy-Fifth Annual Meeting* (1993; Uniform Law Conference of Canada, Edmonton, Alberta) at 122, online: <http://www.ulcc.ca/en/poam2/index.cfm?sec=1993>.

[4] *Uniform Enforcement of Canadian Judgments and Decrees Act*, online: ULCC <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e4>, as amended by the *Uniform Enforcement of Canadian Judgments and Decrees Amendment Act*, online: ULCC <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e4a&print=1>. See Appendix A.

scrutiny of the procedural fairness, rational assumption of jurisdiction, and reasonable quantification of damages in the original court.[5]

[8] The *Uniform Court Jurisdiction and Proceedings Transfer Act* gives a provincial court a clear, uniform framework to decide when it should or should not hear a case. It also empowers a provincial court to direct transfers of proceedings to and from that province.[6]

[9] The ULCC's Commercial Law Strategy, and more importantly the ULCC's uniform three-part legislative enforcement scheme, responds to the needs within the Canadian economy - that a legislative framework be predictable, responsive and efficient. It addresses the practical problems that create legal barriers to trans-Canada and international commercial relations. The enactment of the uniform enforcement scheme is part of the process which will lead to successful harmonization and ultimately to Canada's increased vitality as a competitive trading nation with growth of business and employment in Canada. The implementation of the enforcement scheme across Canada will provide businesses operating across provincial boundaries with more certainty that, if difficulties arise in their transactions, their rights and ultimately their judgments will be enforceable. The implementation of the enforcement scheme in Alberta will encourage businesses operating elsewhere in Canada or the world, to conduct their business within Alberta due to the certainty that almost any judgment appropriately obtained outside Alberta will be recognized by the Alberta courts and enforceable in Alberta.

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[5] *Uniform Enforcement of Foreign Judgments Act*, online: ULCC <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1c5&print=1>. See Appendix B.

[6] *Uniform Court Jurisdictions and Proceedings Transfer Act*, online: ULCC <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1c4&print=1>. See Appendix C.

# CHAPTER 2. BACKGROUND

## A. The Reciprocal Enforcement of Judgments Regime

[10] Since 1925, Alberta has had a legislative regime whereby money judgments from other specified jurisdictions could be registered with the Alberta courts thereby making the judgments recognized and enforceable in Alberta.[7] With the exception of the addition of jurisdictions, this reciprocal enforcement system has remained virtually unchanged.[8]

[11] In the original 1925 statute, a judgment was broadly defined as:[9]

> ...any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the Province or territory where it was made, become enforceable in the same manner as a judgment given by a Court therein.

In the current version, a judgment is similarly defined as:[10]

> ... a judgment or order of a court in a civil proceeding whereby a sum of money is made payable, and includes an award in an arbitration proceeding if the award, under the law in force in the jurisdiction where it was made, has become enforceable in the same manner as a judgment given by a court in that jurisdiction, but does not include an order for the payment of money as alimony or as maintenance for a spouse or former spouse or an adult interdependent partner or former adult interdependent partner or a child, or an order made against a putative father of an unborn child for the maintenance or support of the child's mother.

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[7] *Reciprocal Enforcement of Judgments Act*, S.A. 1925, c. 5, proclaimed into force September 1, 1925.

[8] See *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6. Previously R.S.A. 1980, c. R-6; R.S.A. 1970, c. 312; S.A. 1958, c. 33; R.S.A. 1955, c. 280; R.S.A. 1942, c. 140; S.A. 1925, c. 5.

[9] *Reciprocal Enforcement of Judgments Act*, note 7, s. 2(1)(a).

[10] *Reciprocal Enforcement of Judgments Act*, note 8, s. 1(1)(b). The exclusion of alimony, maintenance and support orders from the definition of judgment occurred in 1958: *Reciprocal Enforcement of Judgments Act*, S.A. 1958, c. 33, s. 2(1)(a), coming into force April 14, 1958. Support orders from reciprocating jurisdictions are currently enforceable in Alberta pursuant to the reciprocal enforcement regime established by the *Interjurisdictional Support Orders Act*, S.A. 2002, c. I-3.5.

[12] Alberta's reciprocal enforcement regime is based upon reciprocal agreements between jurisdictions. Judgments from a court of competent jurisdiction in a country with which there is a reciprocal agreement may be registered under Alberta's *Reciprocal Enforcement of Judgments Act*. If another country is willing to allow for the registration, recognition and enforcement of Alberta judgments, then the Alberta courts will in turn register, recognize and enforce that country's judgments. The list of reciprocal jurisdictions includes both Canadian and foreign provinces and territories.

| **In Force** | **Reciprocating Jurisdiction** | **Alta. Reg.** |
|---|---|---|
| 1925 | Province of Saskatchewan | 1121/25; 1483/25 |
| 1926 | Province of British Columbia | 148/26 |
| 1935 | Province of Ontario | 493/35 |
| 1950 | Province of Manitoba | 741/50 |
| 1955 | Northwest Territories | 1151/55 |
| 1957 | *reaffirmed the reciprocity with the above 5 jurisdictions* | 579/57 |
| 1961 | Province of Newfoundland | 139/61 |
| 1961 | Yukon Territory | 140/61 |
| 1973 | Province of Nova Scotia | 126/73 |
| 1975 | Province of Prince Edward Island | 39/75 |
| 1980 | State of Tasmania, Commonwealth of Australia; Northern Territory, Commonwealth of Australia | 136/80 |
| 1985 | *reaffirmed the reciprocity with the above 11 jurisdictions* | 344/85 |
| 1990 | Province of New Brunswick; State of Washington, United States of America | 179/90 |
| 1990 | State of Idaho, United States of America | 297/90 |
| 1994 | State of Montana, United States of America | 175/94 |
| 1995 | *struck Tasmania and the Northern Territory and replaced with:* Commonwealth of Australia | 56/95 |
| 1999 | Nunavut | 81/99 |

[13] In addition to Alberta's *Reciprocal Enforcement of Judgments Act*, s. 3 of the *International Conventions Implementation Act*[11] renders the provisions of the Convention between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters[12] applicable in Alberta. This Convention creates a similar registration scheme in Alberta for judgments granted by any court of the United Kingdom.

[14] The procedures under the *Reciprocal Enforcement of Judgments Act* and the Convention are reinforced by the current provisions of the *Alberta Rules of Court*.[13] It is the intention to incorporate similar provisions into the new rules proposed by the Alberta Law Reform Institute.[14]

## B. *Morguard Investments Ltd. v. De Savoye*

[15] The 1990 Supreme Court of Canada decision in *Morguard* heralded a new era for Canadian conflict of laws. *Morguard* concerns the recognition to be given by the courts in one province to a judgment of the courts of another province. In *Morguard*, the mortgagees obtained orders in foreclosure proceedings in Alberta, including personal judgment against the mortgagor for deficiency after sale. The mortgagor resided in British Columbia and took no part in the Alberta proceedings, although he was served *ex juris*. The mortgagees sought to enforce the deficiency judgments in British Columbia. The mortgagees brought an application to register the Alberta deficiency judgments pursuant to British

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[11] *International Conventions Implementation Act*, R.S.A. 2000, c. I-6.

[12] The Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, being Schedule 3 of the *International Conventions Implementation Act*, note 11. The convention came into force January 1, 1987, and was amended in December 1995. Although Canada has also signed the Convention between the Government of Canada and the Government of the French Republic on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Mutual Legal Assistance in Maintenance, online: <http://www.treaty-accord.gc.ca/Details.asp?Treaty_ID=101228> (signed June 10, 1996), this Convention has yet to enter into force, and Alberta has, as of yet, not passed legislation to render the provisions applicable in Alberta.

[13] *Alberta Rules of Court*, Alta. Reg. 390/68, Parts 55 and 55.1.

[14] Alberta Law Reform Institute, *Rules of Court Project*, Final Report No. 95, (2008). See Appendix H, Proposed Rules of Court, Part 9, Divisions 7 and 8.

Columbia's reciprocal enforcement legislation. The question for the British Columbia court was whether the issuing Alberta court had jurisdiction when the mortgagor had neither attorned to Alberta's jurisdiction nor been served in Alberta.

[16] Before the Supreme Court of British Columbia, the mortgagor argued that the mortgagees were not entitled to enforce the Alberta judgments in British Columbia because he had never attorned to the jurisdiction of the Alberta court. The chambers judge noted that the Alberta court clearly had jurisdiction over the subject properties and thus the foreclosure proceedings. She also noted that there did not appear to be anything amiss in the Alberta court granting orders for service *ex juris* by double registered mail addressed to the mortgagor's home in British Columbia. The chambers judge held that the Alberta court had not improperly exercised its discretion to assume jurisdiction, as no other court would have been a more convenient forum to adjudicate the matter. Concluding that the Alberta court had the jurisdiction to make the orders in question, the chambers judge ordered that the mortgagees were entitled to registration for enforcement in British Columbia for the deficiencies.

[17] The British Columbia Court of Appeal dismissed the mortgagor's appeal. In the court's view, the Alberta default judgments could be enforced on the basis of reciprocity of practice in the two provinces. The court held that an Alberta judgment should be recognized and enforced in British Columbia. The Court of Appeal held jurisdiction was present "if the Alberta court took jurisdiction in circumstances in which, if the facts were transposed to British Columbia, the courts of British Columbia would have taken jurisdiction as well."[15] The court coined the phrase "reciprocity of practice" to describe such circumstances.

[18] The principle of reciprocity of practice, also known as equivalence of practice, had been previously established in English family law with the case of *Travers v. Holley*.[16] As Lord Justice Hodson put it:[17]

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[15] *Morguard*, note 2, at 1084.

[16] *Travers v. Holley*, [1953] 2 All E.R. 794 (C.A.).

[17] *Travers v. Holley*, note 16, at 800.

> ... where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves.

[19] The mortgagor's further appeal to the Supreme Court of Canada was also dismissed. Justice La Forest, writing on behalf of the court, rejected the common law tests in relation to jurisdiction. What emerged was a principle that the court of one Canadian province should enforce a judgment from another Canadian province where the defendant or the subject matter of the dispute has a real and substantial connection with the forum from which the judgment is granted. This is a much wider basis of jurisdiction than the historical common law tests. In *Morguard*, Justice La Forest was searching for a higher level principle when it came to jurisdiction and he acknowledged that the court was just beginning to articulate the principle in its decision. Justice La Forest also fully recognized that the court was overturning 100 years of dogma.

[20] The oft quoted headnote describes Justice La Forest's decision as follows:[18]

> ...*[C]omity* is based not simply on respect for a foreign sovereign, but on convenience and even necessity. Modern times require that the flow of wealth, skills and people across boundaries be facilitated in a fair and orderly manner. Principles of order and fairness which ensure security of transactions with justice must underlie a modern system of private international law. The content of comity therefore must be adjusted in the light of a changing world order.
>
> *No real comparison exists between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century*. The courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state.
>
> The 19th century English rules fly in the face of the obvious intention of the Constitution to create a single country with a common market and a common citizenship. The constitutional arrangements made to effect this goal, such as the removal of barriers to interprovincial trade and mobility guarantees, speak to the strong need for the enforcement throughout the country of judgments given in one province. ...

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[18] *Morguard*, note 2, at 1098.

> The courts in one province should give "*full faith and credit*" to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. Both order and justice militate in favour of the security of transactions. It is anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province.
>
> *These concerns, however, must be weighed against fairness to the defendant*. The taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives and recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject matter of the suit. If the courts of one province are to be expected to give effect to judgments given in another province, there must be some limit to the exercise of jurisdiction against persons outside the province. If it is reasonable to support the exercise of jurisdiction in one province, it is reasonable that the judgment be recognized in other provinces.
>
> *The approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance* between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. [emphasis added]

## C. Post-*Morguard*

[21] It is important to understand that the Supreme Court of Canada's decision in *Morguard* does not replace or subsume Alberta's reciprocal enforcement scheme. Prior to *Morguard*, a judgment holder had the following three options when enforcing in another jurisdiction:

1) sue on the original cause of action in the second jurisdiction, raising the possible defence of issue estoppel but not *res judicata*;
2) sue on the judgment in the second jurisdiction on the grounds that the judgment forms the basis of an outstanding obligation owed by the judgment debtor; or
3) where appropriate and available, register the judgment under the second jurisdiction's reciprocal enforcement legislation.

Post-*Morguard*, a judgment holder still has these three options but *Morguard* changed the definition of jurisdiction, impacting the second and third options. The second and third options involve an element of the courts of the second jurisdiction

determining whether the originating court was a court of competent jurisdiction to issue the judgment in the first place. Within a federal system such as Canada, *Morguard* holds that the courts of one province or territory cannot question the assumption of jurisdiction by the courts of another province or territory.

[22] The concurrent existence of both enforcement regimes is further confirmed by the provisions of Alberta's *Reciprocal Enforcement of Judgments Act*:[19]

> **Judgment creditor**
>
> 7 Nothing in this Act deprives a judgment creditor of the right to bring action on the judgment creditor's judgment or on the original cause of action
>
> (a) after proceedings have been taken under this Act, or
>
> (b) instead of proceeding under this Act,
>
> and the taking of proceedings under this Act, whether or not the judgment is registered, does not deprive a judgment creditor of the right to bring action on the judgment or on the original cause of action.

[23] Based upon the "full faith and credit" principle of *Morguard*, a judgment creditor can choose to bring an action for enforcement in Alberta of a judgment granted by any other Canadian jurisdiction, rather than utilizing the registration mechanism under the *Reciprocal Enforcement of Judgments Act*. *Morguard* has been followed in subsequent Alberta decisions, most recently by the Court of Appeal in *B. (D.) v. M. (L.)*.[20]

[24] *Morguard* also covers circumstances not addressed by the reciprocal enforcement legislation. While Alberta currently has agreements with all of the other common law Canadian provinces and territories, judgments from Quebec do not fall under the current legislative scheme. Also, Alberta's legislative scheme, by definition, only addresses money judgments, excluding orders for alimony, maintenance or support, whereas the principles of *Morguard* cover any type of final judgment.

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[19] *Reciprocal Enforcement of Judgments Act*, note 8, s. 7.

[20] *B. (D.) v. M. (L.)(2007)*, 404 A.R. 271 (C.A.).

# CHAPTER 3. THE UNIFORM ACTS

## A. *Uniform Enforcement of Canadian Judgments and Decrees Act*

[25] The *Uniform Enforcement of Canadian Judgments and Decrees Act* was first adopted and recommended by the ULCC in 1992, and has since been revised in 1997 and further amended in 2004 and 2005.[21] The Act was originally restricted to money judgments, but gradually the ULCC adapted it to apply also to non-money judgments, criminal restitution orders and civil protection orders. The Act is based on the conceptual principles of *Morguard* and eliminates the process of court application.

[26] The preliminary comments of the ULCC in describing the *Uniform Enforcement of Canadian Judgments and Decrees Act* state:[22]

> The Uniform Enforcement of Canadian Judgments and Decrees Act ("UECJDA") embodies the notion of "full faith and credit" in the enforcement of judgments between the provinces and territories of Canada. It involves rejection of two themes which have, in the past, characterized the machinery for enforcing such judgments.
>
> First it rejects the concept of reciprocity. Where the UECJDA has been adopted in province "X", a litigant who has taken judgment in province "Y" may enforce that judgment in province "X" under the legislation whether or not the UECJDA has been adopted in province "Y." This stands in contrast to the approach of the Uniform Reciprocal Enforcement of Judgments Act ("UREJA").
>
> Second, the Act rejects a supervisory role for the courts of a province or territory where the enforcement of an out-of-province judgment ["Canadian judgment"] is sought. The common law and the UREJA are preoccupied with the question of whether the court which gave the judgment had the jurisdiction to do so. If a Canadian judgment is flawed, because of some defect in the jurisdiction or process of the body which gave it, the approach of the UECJDA is to regard correction of the flaw as a matter to be dealt with in the place where it was made.
>
> As a general rule, a creditor seeking to enforce a Canadian judgment in a province or territory which has enacted the UECJDA should face no substantive or procedural barriers except those which govern the enforcement of judgments of the local courts.

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[21] *Uniform Enforcement of Canadian Judgments and Decrees Act*, note 4. See Appendix A.

[22] *Uniform Enforcement of Canadian Judgments and Decrees Act*, note 4, at 1-2.

> An important feature of UECJDA is that it provides a mechanism for the enforcement of non-money judgments. Apart from legislation that addresses particular types of orders, there is no statutory scheme or common law principle which permits the enforcement in one province of a non-money judgment made in a different province. This is in sharp contrast to the situation that prevails with respect to money judgments which have a long history of enforceability between provinces and states both under statute and at common law. With the increasing mobility of the population and the emergence of policies favouring the free flow of goods and services throughout Canada, this gap in the law has become highly inconvenient. UECJDA provides a rational statutory basis for the enforcement of non-money judgments between the Canadian provinces and territories.

## B. *Uniform Enforcement of Foreign Judgments Act*

[27] The *Uniform Enforcement of Foreign Judgments Act* was first adopted and recommended by the ULCC in 2003.[23] The Act codifies the requirements of real and substantial connection, but enhances the review of the foreign court's standard of procedural fairness and reasonableness of its award of damages. It retains the requirements of compliance with public policy.

[28] The opening comments of the ULCC in describing the *Uniform Enforcement of Foreign Judgments Act* state:[24]

> As is customary the proposed uniform act on enforcement of foreign judgments includes a section on definitions. Most of them are self-explanatory.
>
> In light of ULCC-Civil Section discussions, the scope of the future UEFJA is not limited to only foreign judgments that are final and monetary in nature (see the definition of "civil proceeding"). It was also decided that the Act would not include foreign provisional orders (see the definition of "foreign judgment" which limits the application of the Act to final decisions). Finally, the Act applies to foreign final judgments, even where such a judgment was not rendered by a court but rather by another adjudicative body, where the enforcing court in the province or territory adopting the Act is satisfied that the adjudicative body that rendered the decision was empowered to do so. Thus a decision rendered by an administrative tribunal could be covered by the Act if it arose from a civil proceeding and did not concern administrative law.
>
> In terms of the procedure set out in the Act, the expression "registration" is used, but the definition here is intended to include any procedure by which a foreign judgment is made enforceable in the same manner as a local judgment. This would include, notably, the Quebec procedure under which an

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[23] *Uniform Enforcement of Foreign Judgments Act*, note 5. See Appendix B.

[24] *Uniform Enforcement of Foreign Judgments Act*, note 5, at 2-3.

> application is made to the court to render the judgment executory in Quebec, and the court's order is the means by which this is achieved. It is immaterial for the purposes of the definition whether the "registration" is *ex parte*, with notice and an opportunity to oppose enforcement being given to the debtor afterwards, or the "registration" is made only after the debtor is given notice and an opportunity to oppose.

## C. *Uniform Court Jurisdiction and Proceedings Transfer Act*

[29] The *Uniform Court Jurisdiction and Proceedings Transfer Act* was adopted and recommended by the ULCC in 1994, and amended in 1995.[25] The Act responds to the assumption both in *Morguard* and in the Canadian judgment enforcement acts that the issuing court acted on the basis of a rational assumption of jurisdiction. The Act defines the basis for that assumption and makes the break from reliance upon rules of service. It provides for a principled assumption of jurisdiction for Alberta and adds the power to transfer proceedings to deal with the vacuum if a *forum non conveniens* argument is successful.

[30] The introductory comments of the ULCC in describing the *Uniform Court Jurisdiction and Proceedings Transfer Act* state:[26]

> This proposed uniform Act has four main purposes:
>
> (1) to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction;
>
> (2) to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077, and *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897;
>
> (3) by providing uniform jurisdictional standards, to provide an essential complement to the rule of nation-wide enforceability of judgments in the uniform *Enforcement of Canadian Judgments Act*; and
>
> (4) to provide, for the first time, a mechanism by which the superior courts of Canada can transfer litigation to a more appropriate forum in or outside Canada, if the receiving court accepts such a transfer.
>
> To achieve the first three purposes, this Act would, for the first time in common law Canada, give the substantive rules of jurisdiction an express statutory form instead of leaving them implicit in each province's rules for service of process. In the vast majority of cases this Act would give the same result as existing law, but the principles are expressed in different

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[25] *Uniform Court Jurisdiction and Proceedings Transfer Act*, note 6. See Appendix C.

[26] *Uniform Court Jurisdiction and Proceedings Transfer Act*, note 6, at 3.

terms. Jurisdiction is not established by the availability of service of process, but by the existence of defined connections between the territory or legal system of the enacting jurisdiction, and a party to the proceeding or the facts on which the proceeding is based. The term "territorial competence" has been chosen to refer to this aspect of jurisdiction (section 1, "territorial competence") and distinguish it from other jurisdictional rules relating to subject-matter or other factors (section 1, "subject matter competence").

By including the transfer provisions in the same statute as the provisions on territorial competence, the Act would make the power to transfer, along with the power to stay proceedings, an integral part of the means by which a Canadian court can deal with proceedings that more appropriately should be heard elsewhere.

# CHAPTER 4. ADAPTING THE UNIFORM ACTS FOR ALBERTA

[31] Since the ULCC adopted and recommended the first *Uniform Enforcement of Canadian Judgments and Decrees Act* in 1992, there have been a number of amendments. These amendments have included combining the enforcement of judgments and the enforcement of decrees into one act, and adding other types of orders within the definition of judgment. It is recommended that Alberta enact the updated versions, including the subsequent amendments.

[32] The ULCC has expressly provided for certain necessary local adaptations of the uniform acts based upon the existing legislation in jurisdictions enacting them. There are several local adaptations which Alberta should consider.

## A. *Uniform Enforcement of Canadian Judgments and Decrees Act*

### 1. Definition of "Canadian judgment" (s. 1)

[33] Section 1 of the *Uniform Enforcement of Canadian Judgments and Decrees Act* provides:

> "Canadian judgment" means a judgment, decree or order made in a civil proceeding by a court of a province or territory of Canada other than [*enacting province or territory*]
>
> (a) that requires a person to pay money, including an order for the payment of money that is made in the exercise of a judicial function by a tribunal of a province or territory of Canada other than [enacting province or territory] and that is enforceable as a judgment of the superior court of unlimited trial jurisdiction in that province or territory,
>
> (b) under which a person is required to do or not do an act or thing, or
>
> (c) that declares rights, obligations or status in relation to a person or thing but does not include a judgment, decree or order that
>
> (d) is for maintenance or support, including an order enforceable under the [*appropriate Act in the enacting province or territory*],
>
> (e) is for the payment of money as a penalty or fine for committing an offence.
>
> (f) relates to the care, control or welfare of a minor;
>
> (g) is made by a tribunal of a province or territory of Canada other than [*enacting province or territory*] whether or not it is enforceable as an order of the superior court of unlimited trial jurisdiction of the province or territory where the order was made, to the extent that it provides for relief other than the payment of money, or

[(h) relates to the granting of probate or letters of administration or the administration of the estate of a deceased person;]

### *a. Maintenance and support*

[34] The ULCC has expressly excluded from the definition of "Canadian judgment" a "judgment, decree or order that...(d) is for maintenance or support, including an order enforceable under the [appropriate Act...]." The ULCC annotation states that s. 1 is intended to exclude "orders that are the subject of existing machinery for interprovincial enforcement."

[35] In Alberta, the *Maintenance Enforcement Act*[27] provides for the enforcement of orders registered under the *Interjurisdictional Support Orders Act*.[28] Thus, in Alberta, the definition of Canadian judgment should refer to the *Maintenance Enforcement Act*.

### *b. Probate and administration*

[36] The ULCC has also expressly excluded from the definition of "Canadian judgment" a "judgment, decree or order that...(h) relates to the granting of probate or letters of administration or the administration of the estate of a deceased person." The ULCC annotation states that most Canadian jurisdictions have already legislated on the recognition of foreign probates. Subsection (h) is therefore optional, in that the enacting jurisdiction may prefer its existing law. However, all of the Canadian jurisdictions which have enacted the *Uniform Enforcement of Canadian Judgments and Decrees Act* have retained uniform subsection (h) in the definition of Canadian judgment.[29]

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[27] *Maintenance Enforcement Act*, R.S.A. 2000, c. M-1.

[28] *Interjurisdictional Support Orders Act*, S.A. 2002, c. I-3.5.

[29] See British Columbia: *Enforcement of Canadian Judgments and Decrees Act*, S.B.C. 2003, c. 29; Saskatchewan: *The Enforcement of Canadian Judgments Act, 2002*, S.S. 2002, c. E-9.1001; Manitoba: *The Enforcement of Canadian Judgments Act*, S.M. 2005, c. 50; Nova Scotia: *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c. 30; and Yukon: *Enforcement of Canadian Judgments and Decrees Act*, S.Y. 2000, c. 12.

[37] Alberta has already legislated on the recognition of foreign grants of probate or administration, including those from any Canadian jurisdiction.[30] There is no obvious reason why Alberta should change its existing legislation. Alberta should therefore enact uniform subsection (h).

### 2. Procedure for registering Canadian judgment (s. 3(1))

[38] Section 3(1) of the *Uniform Enforcement of Canadian Judgments and Decrees Act* provides:

> 3. (1) A Canadian judgment is registered under this Act by paying the fee prescribed by regulation and by filing in the registry of the [*superior court of unlimited trial jurisdiction in the enacting province or territory*]
>
> (a) a copy of the judgment, certified as true by a judge, registrar, clerk or other proper officer of the court that made the judgment, and
>
> (b) the additional information or material required by regulation.

[39] Section 3(1) refers to a court "registry." This term, however, does not fit neatly into the Alberta Court of Queen's Bench regime. Appropriate language for Alberta may be "filing with the Court of Queen's Bench."

### 3. Time limit for registration and enforcement (s. 5(1)(b))

[40] Section 5(1) of the *Uniform Enforcement of Canadian Judgments and Decrees Act* provides:

> 5. (1) A Canadian judgment that requires a person to pay money must not be registered or enforced under this Act
>
> (a) after the time for enforcement has expired in the province or territory where the judgment was made; or
>
> (b) later than [xxx] years after the day on which the judgment became enforceable in the province or territory where it was made.

[41] Section 5(1)(b) contemplates that each jurisdiction will insert the same number of years as for the enforcement of money judgments of the superior court of unlimited trial jurisdiction. In Alberta, this number is 10 years.[31]

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[30] See *Administration of Estates Act*, R.S.A. 2000, c. A-2, s. 29.

[31] See *Civil Enforcement Act*, R.S.A. 2000, c. C-15, s. 27(2)(b).

### 4. Orders to stay or limit enforcement (s. 6(2)(c)(i))

[42] Section 6(2) of the *Uniform Enforcement of Canadian Judgments and Decrees Act* provides:

> 6. (2) On an application under subsection (1), the court may
>
> (a) make an order that the judgment be modified as may be required to make it enforceable in conformity with local practice,
>
> (b) make an order stipulating the procedure to be used in enforcing the judgment,
>
> (c) make an order staying or limiting the enforcement of the judgment, subject to any terms and for any period the court considers appropriate in the circumstances, if
>
> (i) such an order could be made in respect of an order or judgment of the [superior court of unlimited trial jurisdiction in the enacting province or territory] under [the statutes and the rules of court] [any enactment of the enacting province or territory] relating to legal remedies and the enforcement of orders and judgments,
>
> (ii) the party against whom enforcement is sought has brought, or intends to bring, in the province or territory where the Canadian judgment was made, a proceeding to set aside, vary or obtain other relief in respect of the judgment,
>
> (iii) an order staying or limiting enforcement is in effect in the province or territory where the Canadian judgment was made, or
>
> (iv) is contrary to public policy in [the enacting province or territory].

[43] Section 6(2)(c)(i) would allow an Alberta court to stay or limit enforcement, if such an order is available for "an order or judgment of the [Alberta court] under [any enactment...] relating to legal remedies and the enforcement of orders and judgments." Different jurisdictions have chosen different language here. The more inclusive, and perhaps most appropriate, option is Yukon Territory section 6(2)(c)(i) "an order or judgment of the [Yukon court] for the same type of remedy."[32]

[44] It is recommended that Alberta adopt the more inclusive language.

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[32] Yukon: *Enforcement of Canadian Judgments and Decrees Act*, note 29.

## B. *Uniform Enforcement of Foreign Judgments Act*

### 1. Time periods (s. 5)

[45] Section 5 of the *Uniform Enforcement of Foreign Judgments Act* provides:

> 5. A foreign judgment can be enforced in [the enacting province or territory] only within the period provided by the law of the State of origin, or within ten years after the day on which the foreign judgment becomes enforceable in that State, whichever is earlier.

[46] Section 5 imposes a limitation on the enforcement of a foreign judgment to the time available in the State of origin or 10 years from enforceability in that State, whichever is earlier. In Alberta, this 10-year limitation matches that already in existence for Canadian and Alberta judgments, and Alberta should therefore retain it.

### 2. Limits relating to non-monetary awards (s. 7(1)(c)(i))

[47] Section 7(1) of the *Uniform Enforcement of Foreign Judgments Act* provides:

> 7. (1) In the case of a non-monetary foreign judgment, the enforcing court may, on application by any party,
>
> (a) make an order that the foreign judgment be modified as may be required to make it enforceable in [the enacting province or territory], unless the foreign judgment is not susceptible of being so modified;
>
> (b) make an order stipulating the procedure to be used in enforcing the foreign judgment;
>
> (c) make an order staying or limiting the enforcement of the foreign judgment, subject to any terms and for any period the enforcing court considers appropriate in the circumstances, if
>
> (i) the enforcing court could have made that order with respect to an order or judgment rendered by it under [the statutes and the rules of court] [any enactment of the enacting province or territory] relating to legal remedies and the enforcement of orders and judgments, or
>
> (ii) the judgment debtor has brought, or intends to bring, in the State in which the foreign judgment was made, a proceeding to set aside, vary or obtain other relief in respect of the foreign judgment.

[48] Section 7(1)(c)(i) of the *Uniform Enforcement of Foreign Judgments Act* parallels s. 6(2)(c)(i) of the *Uniform Enforcement of Canadian Judgments and Decrees Act* (see above for comments). Each of these two sections should have the same language.

## C. *Uniform Court Jurisdiction and Proceedings Transfer Act*

[49] There are no local adaptations required for the *Uniform Court Jurisdiction and Proceedings Transfer Act*.

# CHAPTER 5. OTHER SUGGESTED IMPROVEMENTS TO THE UNIFORM ACTS

## A. Enactment in Other Canadian Jurisdictions

[50] Several Canadian jurisdictions have enacted one or more of the uniform acts. The *Uniform Enforcement of Canadian Judgments and Decrees Act* has been enacted and is in force in British Columbia, Saskatchewan, Manitoba and Nova Scotia.[33] It has also been enacted in the Yukon, but is not yet in force.[34]

[51] The *Uniform Enforcement of Foreign Judgments Act* has been enacted and is in force in Saskatchewan.[35]

[52] Strangely enough, other Canadian jurisdictions have enacted the *Uniform Enforcement of Canadian Judgments and Decrees Act* and the *Uniform Enforcement of Foreign Judgments Act*, but not the *Uniform Court Jurisdiction and Proceedings Transfer Act* which is the bedrock for the other legislation as it establishes a court's jurisdiction. The *Uniform Court Jurisdiction and Proceedings Transfer Act* has been enacted and is in force in British Columbia and Saskatchewan.[36] It has also been enacted in Nova Scotia, Prince Edward Island and the Yukon, but is not yet in force in any of these jurisdictions.[37]

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[33] British Columbia: *Enforcement of Canadian Judgments and Decrees Act*, note 29, in force May 4, 2006; Saskatchewan: *The Enforcement of Canadian Judgments Act, 2002*, note 29, in force January 1, 2003; Manitoba: *The Enforcement of Canadian Judgments Act*, note 29, in force March 22, 2006; and Nova Scotia: *Enforcement of Canadian Judgments and Decrees Act*, note 29, in force July 1, 2006.

[34] Yukon: *Enforcement of Canadian Judgments and Decrees Act*, note 29.

[35] *The Enforcement of Foreign Judgments Act*, S.S. 2005, c. E-9.121, in force April 19, 2006.

[36] British Columbia: *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, in force May 4, 2006; and Saskatchewan: *The Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1, in force March 1, 2004.

[37] Nova Scotia: *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2d Sess.), c. 2; Prince Edward Island: *Court Jurisdiction and Proceedings Transfer Act*, S.P.E.I. 1997, c. 61; and Yukon: *Court Jurisdiction and Proceedings Transfer Act*, S.Y. 2000, c. 7.

[53] Each jurisdiction in which the uniform acts have been enacted has incorporated minor changes and local adaptations. Some of these changes are obvious improvements to the uniform acts, and are thus recommended to be included if Alberta enacts the three-part legislation.

## B. *Uniform Enforcement of Canadian Judgments and Decrees Act*

### 1. Civil protection orders (s. 1)

[54] Both Manitoba and Nova Scotia have added a definition of "Canadian civil protection order" to the definitions of the *Uniform Enforcement of Canadian Judgments and Decrees Act*.[38] In both cases, the definition is:

> **"Canadian civil protection order"** means a Canadian judgment or a portion of a Canadian judgment that prohibits a person from
>
> (a) being in physical proximity to a specified person or following a specified person from place to place;
>
> (b) contacting or communicating with a specified person, either directly or indirectly;
>
> (c) attending at or within a certain distance of a specified place or location; or
>
> (d) engaging in molesting, annoying, harassing or threatening conduct directed at a specified person.

[55] In both the Manitoba and Nova Scotia Acts, the specific inclusion of civil protection orders within the *Uniform Enforcement of Canadian Judgments and Decrees Act* also required amendments elsewhere. In addition to adding Canadian civil protection order to the definition of "Canadian judgment",[39] the provisions as to where an application for directions is required[40] and the application of the Act,[41] Manitoba has also added an additional part to its *Uniform Enforcement of*

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[38] Manitoba: *The Enforcement of Canadian Judgments Act*, note 29, s. 1; and Nova Scotia: *Enforcement of Canadian Judgments and Decrees Act*, note 29, s. 2(a).

[39] Manitoba: *The Enforcement of Canadian Judgments Act*, note 29, s. 1, "Canadian judgment" (f). Similarly for Nova Scotia, see Nova Scotia: *Enforcement of Canadian Judgments and Decrees Act*, note 29, s. 2(aa)(vi).

[40] Manitoba: *The Enforcement of Canadian Judgments Act*, note 29, s. 6(4).

[41] Manitoba: *The Enforcement of Canadian Judgments Act*, note 29, s. 15. Similarly for Nova Scotia, see Nova Scotia: *Enforcement of Canadian Judgments and Decrees Act*, note 29, s. 11E.

*Canadian Judgments and Decrees Act* which applies specifically to Canadian civil protection orders:[42]

> **Deeming of order**
>
> 10 A Canadian civil protection order is deemed to be an order of the Court of Queen's Bench and may be enforced in the same manner as an order of that court for all purposes, whether or not the order is a registered Canadian judgment.
>
> **Enforcement by law enforcement agencies**
>
> 11 A Canadian civil protection order is enforceable by a law enforcement agency in the same manner as an order of the Court of Queen's Bench, whether or not the order is a registered Canadian judgment.
>
> **Registration permitted**
>
> 12 A Canadian civil protection order may be registered and enforced as a Canadian judgment for the purposes of this Act.
>
> **Immunity**
>
> 13 No action or proceeding shall be commenced against a law enforcement agency, or an employee or agent of a law enforcement agency, for anything in good faith done or omitted to be done in the enforcement of a Canadian civil protection order or a purported Canadian civil protection order.

[56] It is recommended that Alberta follow Manitoba's example and enact the above amendments, as well as the additional provisions with respect to civil protection orders.

### 2. Restitution orders (s. 1)

[57] The uniform definition of "Canadian judgment" refers to s. 725 of the *Criminal Code* (Canada).[43] The updated reference, if any, should now be to s. 741 (enforcing restitution order). At its 2004 Annual Meeting, the ULCC amended the *Uniform Enforcement of Canadian Judgments and Decrees Act* to delete the reference to restitution orders because recent amendments to the *Criminal Code* have both eliminated the need for this reference and complicated its compatibility

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[42] Manitoba: *The Enforcement of Canadian Judgments Act*, note 29, ss. 10-13. Similarly for Nova Scotia, see Nova Scotia: *Enforcement of Canadian Judgments and Decrees Act*, note 29, ss. 11A-11D.

[43] *Uniform Enforcement of Canadian Judgments and Decrees Act*, note 4, s.1, "Canadian judgment" (a)(ii).

with the remainder of the Act.[44] In that context, deleting the reference to restitution orders is preferable for Alberta.

### 3. Procedure for registering a Canadian judgment (s. 3(1))

[58] Section 3(1) of the *Uniform Enforcement of Canadian Judgments and Decrees Act* provides:

> 3. (1) A Canadian judgment is registered under this Act by paying the fee prescribed by regulation and by filing in the registry of the [*superior court of unlimited trial jurisdiction in the enacting province or territory*]
>
> (a) a copy of the judgment, certified as true by a judge, registrar, clerk or other proper officer of the court that made the judgment, and
>
> (b) the additional information or material required by regulation.

[59] Section s. 3(1)(a) reads "certified as true by a judge, registrar, clerk or other proper officer of the court that made the judgment." Manitoba's s. 3(a) simplifies this to "certified as true by an officer of the court that made the judgment."[45] The simplified language allows for changes to those persons who might be considered to be officers of the court. It is recommended that Alberta use the simplified language.

### 4. Time limit for registration and enforcement (s. 5(1))

[60] Section 5(1) of the *Uniform Enforcement of Canadian Judgments and Decrees Act* provides:

> 5. (1) A Canadian judgment that requires a person to pay money must not be registered or enforced under this Act
>
> (a) after the time for enforcement has expired in the province or territory where the judgment was made; or
>
> (b) later than [xxx] years after the day on which the judgment became enforceable in the province or territory where it was made.

[61] Section 5(1) imposes a limitation on the registration of a "Canadian judgment that requires a person to pay money." Manitoba's s. 5(1) instead reads "[t]he

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[44] See 2004 ULCC Annual Meeting Civil Section Minutes, online: <http://www.ulcc.ca/en/poam2/index.cfm?sec=2004&sub=2004f>. See also Housekeeping Amendments to *Uniform Enforcement of Canadian Judgments Act* and *Uniform Enforcement of Canadian Judgments and Decrees Act*, online: <http://www.ulcc.ca/en/poam2/UECJA-UECJDA_Housekeeping_En.pdf>.

[45] Manitoba: *The Enforcement of Canadian Judgments Act*, note 29.

provisions of a Canadian judgment that require a person to pay money."[46] This wording is preferable, in that it clarifies the relationship of sections 5(1) and 2(3) of the Act; other provisions of that same Canadian judgment may still be registered despite s. 5(1)'s limitation on the provisions for the payment of money. It is recommended that Alberta use the clarifying language.

### 5. Recovery of registration costs (s. 8)

[62] Section 8 of the *Uniform Enforcement of Canadian Judgments and Decrees Act* provides:

> 8. An enforcing party is entitled to recover all costs, charges and disbursements
>
> (a) reasonably incurred in the registration of a Canadian judgment under this Act, and
>
> (b) taxed, assessed or allowed by [the proper officer] of the [*superior court of unlimited trial jurisdiction in the enacting province or territory*].

[63] Section 8(b) entitles the enforcing party to recover "all costs, charges and disbursements...(b) taxed, assessed or allowed by [the proper officer] of the [superior court of unlimited trial jurisdiction]." Manitoba's s. 8(b) reads "assessed or allowed by the Court of Queen's Bench."[47] Yukon Territory s. 8(b) reads "taxed, assessed, or allowed under the Rules of the Supreme Court."[48] A reference to the Court or Rules, rather than to a specific officer, seems more durable, in the face of changes to names and functions of court officers. It is recommended that Alberta use such a reference.

### 6. Enforcing party's other rights not affected by registration

[64] Section 9 of the *Uniform Enforcement of Canadian Judgments and Decrees Act* provides:

> 9. Neither registering a Canadian judgment nor taking other proceedings under this Act affects an enforcing party's right to bring an action on the original cause of action.

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[46] Manitoba: *The Enforcement of Canadian Judgments Act*, note 29.

[47] Manitoba: *The Enforcement of Canadian Judgments Act*, note 29.

[48] Yukon: *Enforcement of Canadian Judgments and Decrees Act*, note 29.

[65] Section 9 states that registration or proceedings under the Act do not affect the enforcing party's right to bring "an action on the original cause of action." The ULCC annotation states that s. 9 preserves the enforcing party's rights to any existing common law interjurisdictional enforcement procedures. British Columbia's s. 9 and Saskatchewan s. 10(a) read "an action on the Canadian judgment or on the original cause of action."[49] Such language is preferable, in that it expresses the ULCC's intention more clearly. It is recommended that Alberta use such language.

## C. *Uniform Enforcement of Foreign Judgments Act*

### 1. Interest - currency conversion date (s. 15(1)(a))

[66] Section 15(1) of the *Uniform Enforcement of Foreign Judgments Act* provides:

> 15. (1) The interest payable on an amount awarded under a registered foreign judgment is
>
> (a) the interest accruing on that amount under the law of the State of origin, starting on the day on which the foreign judgment became enforceable in that State and ending on the day immediately before the conversion date; and
>
> (b) the interest accruing on that amount under the law of [*the enacting province or territory*], starting on the conversion date and ending on the day on which the judgment debtor makes a payment to the judgment creditor under the registered foreign judgment.

[67] With regard to s. 15(1)(a), Saskatchewan's s. 15(1)(a) reads "ending on the day immediately before the conversion date as described in subsection 13(2)."[50] This express reference back to section 13(2) for a definition of the conversion date adds clarity to section 15(1)(a). It is recommended that Alberta add this express reference to s. 13(2).

### 2. Interest - calculation (s. 15(1)(b))

[68] With regard to s. 15(1)(b) of the *Uniform Enforcement of Foreign Judgments Act*, Saskatchewan s. 15(1)(b) deletes the uniform wording "and ending on the day on which the judgment debtor makes a payment to the judgment creditor under the

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[49] British Columbia: *Enforcement of Canadian Judgments and Decrees Act*; note 29, and Saskatchewan: *The Enforcement of Canadian Judgments Act, 2002*, note 29.

[50] Saskatchewan: *The Enforcement of Foreign Judgments Act*, note 35.

registered foreign judgment."[51] This eliminates a probable redundancy, in that it seems quite sufficient to state "on that amount under the law of [the enacting province] starting on the conversion date." The applicable law of Alberta is s. 6 of the *Judgment Interest Act* which reads "a judgment debt bears interest from the day on which it is payable by or under the judgment until it is satisfied."[52] It is recommended that Alberta delete the redundant wording.

## D. *Uniform Court Jurisdiction and Proceedings Transfer Act*

### 1. Real and substantial connection (s. 10)

[69] Section 10 of the *Uniform Court Jurisdiction and Proceedings Transfer Act* provides:

> 10. Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [enacting province or territory] and the facts on which a proceeding is based, a real and substantial connection between [enacting province or territory] and those facts is presumed to exist if the proceeding
>
> (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in [enacting province or territory],
>
> (b) concerns the administration of the estate of a deceased person in relation to
>
> (i) immovable property of the deceased person in [enacting province or territory], or
>
> (ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in [enacting province or territory],
>
> (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
>
> (i) immovable or movable property in [enacting province or territory], or
>
> (ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in [enacting province or territory],
>
> (d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
>
> (i) the trust assets include immovable or movable property in [enacting province or territory] and the relief claimed is only as to that property;
>
> (ii) that trustee is ordinarily resident in [enacting province or territory];

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[51] Saskatchewan: *The Enforcement of Foreign Judgments Act*, note 35.

[52] *Judgment Interest Act*, R.S.A. 2000, c. J-1, s. 6(2).

(iii) the administration of the trust is principally carried on in [enacting province or territory];

(iv) by the express terms of a trust document, the trust is governed by the law of [enacting province or territory],

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in [enacting province or territory],

(ii) by its express terms, the contract is governed by the law of [enacting province or territory], or

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in [enacting province or territory] by or on behalf of the seller,

(f) concerns restitutionary obligations that, to a substantial extent, arose in [enacting province or territory],

(g) concerns a tort committed in [enacting province or territory],

(h) concerns a business carried on in [enacting province or territory],

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in [enacting province or territory], or

(ii) in relation to immovable or movable property in [enacting province or territory],

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in [enacting province of territory],

(k) is for enforcement of a judgment of a court made in or outside [enacting province or territory] or an arbitral award made in or outside [enacting province or territory], or

(l) is for the recovery of taxes or other indebtedness and is brought by the Crown [of the enacting province or territory] or by a local authority [of the enacting province or territory].

[70] The Yukon has added a section 10(2), which reads as follows:[53]

10(2) Despite the presumption established by subsection (1) a party may prove that there is no real and substantial connection between the Yukon and the facts on which the proceeding is based.

[71] This is a good improvement to the *Uniform Court Jurisdiction and Proceedings Transfer Act*, in that it more clearly expresses the ULCC's intention. The ULCC annotation to s. 10 indicates that a "defendant will still have the right

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[53] Yukon: *Court Jurisdiction and Proceedings Transfer Act*, note 37.

to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial." It is recommended that Alberta add the additional subsection.

### 2. Ordinary residence of partnerships (s. 8)

[72] Section 8 of the *Uniform Court Jurisdiction and Proceedings Transfer Act* provides:

> 8. A partnership is ordinarily resident in [enacting province or territory], for the purposes of this Part, only if
>
> (a) the partnership has, or is required by law to have, a registered office or business address in [enacting province or territory],
>
> (b) it has a place of business in [enacting province or territory], or
>
> (c) its central management is exercised in [enacting province or territory].

[73] In contrast, s. 7 of Saskatchewan's Act provides:[54]

> **Ordinary residence – partnerships**
>
> 7 A partnership is ordinarily resident in Saskatchewan, for the purposes of this Part, only if:
>
> (a) a partner is ordinarily resident in Saskatchewan; or
>
> (b) the partnership has a place of business in Saskatchewan.

[74] The ULCC annotation to s. 8 specifically notes that s. 8 is supposed to define the ordinary residence of a partnership "in a business sense" and exclude territorial competence over the partnership "based on the residence of an individual partner alone."

[75] Despite the fact that Saskatchewan's definition of the ordinary residence of a partnership contradicts the ULCC's intention, Saskatchewan's s. 7(a) is perhaps more workable in practice than s. 8(c) of the *Uniform Court Jurisdiction and Proceedings Transfer Act*. Defining a partnership as ordinarily resident in the jurisdiction if "its central management is exercised" in that jurisdiction may be a properly principled test in theory, but in practice it may be easier to ascertain the ordinary residence of an individual partner than the location where the "central management" of the partnership "is exercised." The latter could easily be

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[54] Saskatchewan: *The Court Jurisdiction and Proceedings Transfer Act*, note 36.

"exercised" interjurisdictionally over the phone or the Internet, which was less likely in the early 1990s when the ULCC recommended the Act.

[76] Interestingly enough, s. 9(a) of the *Uniform Court Jurisdiction and Proceedings Transfer Act* does deem an unincorporated association resident in the jurisdiction if "an officer of the association is ordinarily resident in" the jurisdiction. One could argue that if the ordinary residence of a key individual suffices for ordinary residence of an unincorporated association, then so it should for the ordinary residence of a partnership, which is similarly not incorporated.

[77] It is recommended that Alberta define the ordinary residence of a partnership in the same way as has Saskatchewan.

# CHAPTER 6. CONSEQUENTIAL AMENDMENTS TO ALBERTA STATUTES

## A. *Reciprocal Enforcement of Judgments Act*

### 1. Enforcing party's other rights not affected by registration

[78] Section 9 of the *Uniform Enforcement of Canadian Judgments and Decrees Act* provides:

> 9. Neither registering a Canadian judgment nor taking other proceedings under this Act affects an enforcing party's right to bring an action on the original cause of action.

[79] The ULCC annotation to s. 9 states that s. 9 contemplates the retention of legislation for reciprocal enforcement. The four jurisdictions which have enacted and brought into force the *Uniform Enforcement of Canadian Judgments and Decrees Act*, British Columbia, Saskatchewan, Manitoba and Nova Scotia, have not repealed their reciprocal enforcement legislation.[55] It is recommended that Alberta also maintain its *Reciprocal Enforcement of Judgments Act*. This will, at a minimum, allow for a transitional period, and also will ensure consistency with the other provinces which have enacted the *Uniform Enforcement of Canadian Judgments and Decrees Act*.

[80] In order to avoid confusion and possible statute shopping, Manitoba has explicitly included provisions with respect to its *Reciprocal Enforcement of Judgments Act*:[56]

> **Enforcing party's other rights not affected by registration**
>
> 9 Neither registering a Canadian judgment nor taking other proceedings under this Act affects an enforcing party's right
>
> (a) to bring an action on the original cause of action; or
>
> (b) to register and enforce the Canadian judgment pursuant to *The Reciprocal Enforcement of Judgments Act*.
>
> ...

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[55] See British Columbia: *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78; Saskatchewan: *The Reciprocal Enforcement of Judgments Act, 1996*, S.S. 1996, c. R-3.1; Manitoba: *The Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20; and Nova Scotia: *Reciprocal Enforcement of Judgments Act*, R.S.N.S. 1989, c. 388.

[56] Manitoba: *The Enforcement of Canadian Judgments Act*, note 29.

**Consequential amendment, C.C.S.M. c. J20**

16 Section 13 of *The Reciprocal Enforcement of Judgments Act* is renumbered as subsection 13(1) and the following is added as subsection 13(2):

**Saving re Enforcement of Canadian Judgments Act**

13(2) Nothing in this Act affects the right of a judgment creditor to register his or her judgment under *The Enforcement of Canadian Judgments Act*.

[81] It is recommended that Alberta follow Manitoba's example but take further steps to prevent statute shopping. Alberta should include provisions in both the *Uniform Enforcement of Canadian Judgments and Decrees Act* and the *Uniform Enforcement of Foreign Judgments Act* that nothing in the *Reciprocal Enforcement of Judgments Act* affects the operation of either of the uniform Acts. Further, the *Reciprocal Enforcement of Judgments Act* should provide that a judgment creditor must first seek to register a judgment under the *Uniform Enforcement of Canadian Judgments and Decrees Act* or the *Uniform Enforcement of Foreign Judgments Act*. If neither of the Acts are applicable, then the judgment creditor can seek to register pursuant to the *Reciprocal Enforcement of Judgments Act*. Finally, the *Reciprocal Enforcement of Judgments Act* should provide that nothing in that Act affects a judgment creditor's rights under the *Uniform Enforcement of Canadian Judgments and Decrees Act* or the *Uniform Enforcement of Foreign Judgments Act*.

### 2. Time limit for registration and enforcement

[82] Section 2(1) of Alberta's *Reciprocal Enforcement of Judgments Act* imposes a limitation of 6 years for the registration of a judgment from a reciprocating jurisdiction.[57] However, as previously discussed, s. 5(1)(b) of the *Uniform Enforcement of Canadian Judgments and Decrees Act* should provide for a registration limitation of 10 years, and s. 5 of the *Uniform Enforcement of Foreign Judgments Act* does provide a 10-year limitation. If Alberta enacts the uniform acts and retains the *Reciprocal Enforcement of Judgments Act*, then Alberta should extend the 6 years to 10 years, so as to have the same enforcement registration limitation under all three Acts.

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[57] *Reciprocal Enforcement of Judgments Act*, note 8.

### 3. Conversion to Canadian currency

[83] Section 13(2) of the *Uniform Enforcement of Foreign Judgments Act* provides:

> (2) For the purposes of subsection (1), the conversion date is the last day, before the day on which the judgment debtor makes a payment to the judgment creditor under the registered foreign judgment, on which the bank quotes a Canadian dollar equivalent to the other currency.

[84] According to its annotation to uniform s. 13, the ULCC adopted this conversion date as the "fairest" one, because it reduces parties' exposure to changes in the exchange rate and does not grant too much discretion to the court.[58] The uniform conversion date conflicts with s. 3 of Alberta's *Reciprocal Enforcement of Judgments Act*, which contemplates that the conversion date is the "the date of the entry of the judgment in the original court, as ascertained from any branch of any bank."[59]

[85] If Alberta adopts the uniform acts, it will have to address the inconsistencies in the conversion date, as between the different Alberta enactments pertaining to foreign currency conversion.

## B. *Limitations Act*

[86] The ULCC has recommended in its annotations to s. 5(1) of the *Uniform Enforcement of Canadian Judgments and Decrees Act* that Canadian judgments should be treated "no less" favourably than local judgments. In Alberta, s. 11 of the *Limitations Act* imposes a 10-year limitation on "a remedial order in respect of a claim based on a judgment or order for the payment of money."[60] The Alberta *Limitations Act* language seems broad enough to impose a 10-year limitation on an Alberta action on a Canadian judgment. However, greater clarity may be desirable.

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[58] See 2001 ULCC Minutes of Meeting: Commercial Law Strategy, online: <http://www.ulcc.ca/en/poam2/index.cfm?sec=2001&sub=2001f>. See also ULCC 2000-2001 Working Group on Enforcement of Foreign Judgments: *Uniform Enforcement of Foreign Judgments Act*, Draft - August 2001, online: <http://www.ulcc.ca/en/poam2/index.cfm?sec=2001&sub=2001hg>.

[59] *Reciprocal Enforcement of Judgments Act*, note 8.

[60] *Limitations Act*, R.S.A. 2000, c. L-12.

[87] A precedent for such clarity is Manitoba's legislation:[61]

> **Consequential amendments, C.C.S.M. c. L150**
>
> 17(1) The Limitation of Actions Act is amended by this section.
>
> 17(2) Section 1 is amended by adding the following definition:
>
> "Canadian judgment" means a Canadian judgment as defined in The Enforcement of Canadian Judgments Act; ("jugement canadien")
>
> 17(3) Clause 2(1)(l) is amended by adding "other than a Canadian judgment," after "money,".
>
> 17(4) The following is added after clause 2(1)(l):
>
> (l.1) actions on a Canadian judgment that require a person to pay money,
>
> (i) within the time for enforcement in the province or territory where the judgment was made, or
>
> (ii) within 10 years after the day on which the judgment became enforceable in the province or territory where it was made,
>
> whichever time period is shorter, and no such action shall be brought on a judgment recovered on a previous Canadian judgment;

The Manitoba wording makes it clear that the limitation provisions apply to judgments falling under the *Uniform Enforcement of Canadian Judgments and Decrees Act*. It is recommended that Alberta adopt similar wording.

[88] In any event, the 10-year limitation for an action on an Alberta or Canadian judgment should be the same as that for registering a Canadian judgment under the Alberta equivalent of section 5(1)(b) of the *Uniform Enforcement of Canadian Judgments and Decrees Act*, and also for expiry of judgments under section 27(2)(b) of the *Civil Enforcement Act*.[62]

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[61] Manitoba: *The Enforcement of Canadian Judgments Act*, note 29.

[62] *Civil Enforcement Act*, R.S.A. 2000, c. C-15.

# CHAPTER 7. RECOMMENDATIONS

[89] As a package, the three-part uniform legislation proposed by the ULCC brings certainty in respect of interjurisdictional litigation and enforcement. The uniform acts codify the common law in respect of assumption of jurisdiction and enforcement of Canadian and foreign judgments in accordance with the principles set out in *Morguard*. Other provinces have begun to enact them and Alberta should do so as well.

[90] The *Uniform Court Jurisdiction and Proceedings Transfer Act* will provide greater certainty for parties wishing to litigate in Alberta, in cases arguably falling under the jurisdiction of a court other than Alberta. The Act provides such parties with a rational statement of jurisdiction and a clear framework for the Alberta court to resolve arguments about another court's competing jurisdiction.

[91] The same Act also provides for the transfer of proceedings to and from Alberta, which is a completely new feature designed to ensure that proceedings are heard in what is truly the most appropriate court.

[92] In enacting both the *Uniform Enforcement of Canadian Judgments and Decrees Act* and the *Uniform Enforcement of Foreign Judgments Act*, Alberta will adopt two statutes that presuppose a rational test for the original court's assumption of jurisdiction. These two statutes will allow enforcement in Alberta of judgments from outside Alberta, consistent with the common law and constitutional principles set out in *Morguard* and subsequent cases.

[93] The three uniform acts together implement a harmonized scheme for granting and enforcing judgments, whenever multiple jurisdictions come into play. Alberta should adopt all three Acts together, in order to obtain the full benefit of this harmonized scheme.

[94] The Alberta Law Reform Institute recommends the following action plan for Alberta:

**RECOMMENDATION No. 1**

**Alberta should adopt the**

- ***Uniform Enforcement of Canadian Judgments and Decrees Act,***
- ***Uniform Enforcement of Foreign Judgments Act* and the**
- ***Uniform Court Jurisdiction and Proceedings Transfer Act***

**together as a package. The Acts should include all amendments and local adaptations recommended by ULCC and should incorporate the improvements enacted in other Canadian jurisdictions as noted in this Report.**

**RECOMMENDATION No. 2**

**Leave Alberta's reciprocal enforcement legislation in force but amend it to limit the reciprocal enforcement legislation to situations not dealt with by the three uniform Acts.**

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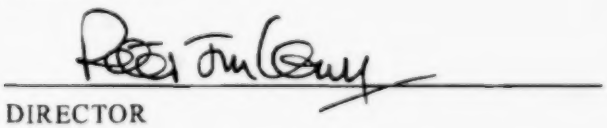

DIRECTOR

# APPENDIX A
# *UNIFORM ENFORCEMENT OF CANADIAN JUDGMENTS AND DECREES ACT*

*(1997 Proceedings at page 41)*

**Contents**



**Comment:** The Uniform Enforcement of Canadian Judgments and Decrees Act ("UECJDA") embodies the notion of "full faith and credit" in the enforcement of judgments between the provinces and territories of Canada. It involves rejection of two themes which have, in the past, characterized the machinery for enforcing such judgments.

First it rejects the concept of reciprocity. 'Where the UECJDA has been adopted in province "X", a litigant who has taken judgment in province "Y" may enforce that judgment in province "X" under the legislation whether or not the UECJDA has been adopted in province "Y." This stands in contrast to the approach of the Uniform Reciprocal Enforcement of Judgments Act ("UREJA").

Second, the Act rejects a supervisory role for the courts of a province or territory where the enforcement of an out-of-province judgment ["Canadian judgment"] is sought. The common law and the UREJA are preoccupied with the question of whether the court which gave the judgment had the jurisdiction to do so. If a Canadian judgment is flawed, because of some defect in the jurisdiction or process of the body which gave it, the approach of the UECJDA is to regard correction of the flaw as a matter to be dealt with in the place where it was made.

As a general rule, a creditor seeking to enforce a Canadian judgment in a province or territory which has enacted the UECJDA should face no substantive or procedural barriers except those which govern the enforcement of judgments of the local courts.

An important feature of UECJDA is that it provides a mechanism for the enforcement of non-money judgments. Apart from legislation that addresses particular types of orders, there is no statutory scheme or common law principle which permits the enforcement in one province of a non-money judgment made in a different province. This is in sharp contrast to the situation that prevails with respect to money judgments which have a long history of enforceability between provinces and states both under statute and at common law. With the increasing mobility of the population and the emergence of policies favouring the free flow of goods and services throughout Canada, this gap in the law has become highly inconvenient. UECJDA provides a rational statutory basis for the enforcement of non-money judgments between the Canadian provinces and territories.

It is important that judges and litigants be sensitive to the fact that non-money judgments are now capable of being enforced in other provinces and territories. There is a danger that they will not turn their minds to this question at the time the order is made. They should be encouraged to do that so, where it is appropriate, the court is given an opportunity to limit the geographic ambit of the judgment. Consideration might be given to formalizing this process in rules of court.

*Definitions*

**1. In this Act:**

**"Canadian judgment" means a judgment, decree or order made in a civil proceeding by a court of a province or territory of Canada other than *[enacting province or territory]***

**(a) requires a person to pay money, including**

**(i) an order for the payment of money that is made in the exercise of a judicial function by a tribunal of a province or territory of Canada other than [enacting province or territory] and that is enforceable as a judgment of the superior court of unlimited trial jurisdiction in that province or territory, and**

**(ii) an order made and entered under section 725 of the Criminal Code (Canada) in a court province or territory of Canada other than *[enacting province or territory]***

**(b) under which a person is required to do or not do an act or thing, or**

**(c) that declares rights, obligations or status in relation to a person or thing but does not include a judgment, decree or order that**

**(d) is for maintenance or support, including an order enforceable under the *[appropriate Act in the enacting province or territory]*,**

**(e) is for the payment of money as a penalty or fine for committing an offence.**

**(f) relates to the care, control or welfare of a minor;**

**(g) is made by a tribunal of a province or territory of Canada other than *[enacting province or territory]* whether or not it is enforceable as an order of the superior court of unlimited trial jurisdiction of the province or territory where the order was made, to the extent that it provides for relief other than the payment of money, or**

**[(h) relates to the granting of probate or letters of administration or the administration of the estate of a deceased person;]**

**Comment:** A central concept of UECJDA is the "Canadian judgment." The term first receives an expansive definition in paragraphs (a) to (c) which is then narrowed by the exclusions that follow. The judgment must have been made in a "civil proceeding."

Paragraph (a) brings in orders for the payment of money. These include certain kinds of "deemed judgments" claims which provincial statutes permit to be enforced as judgments although they have not been the subject of formal litigation in a court. Only orders of tribunals which exercise a judicial function qualify for enforcement as "Canadian judgments." The definition does not extend to deemed judgments based on a certificate of an administrator stating that money is owed to an emanation of government. Other orders which are enforceable as Canadian judgments are those made, in the course of a criminal proceeding, in favour of a victim of crime. These orders are authorized by the Criminal Code and are enforceable as civil judgments.

Paragraph (b) embraces orders such as injunctions and those for specific performance. Paragraph (c) covers orders that operate to define certain rights or relationships. These might include things like adult guardianship orders. It will also include orders which are purely declaratory. Some kinds of declarations are recognized under current law, but that recognition may be subject to a jurisdictional challenge. Bringing them within the definition ensures that the full faith and credit principle applies to them.

Excluded from the definition are types of orders that are the subject of existing machinery for interprovincial enforcement. They include maintenance orders as well as those custody and access in relation to minors. Most Canadian jurisdictions have local legislation respecting the recognition of foreign probates The exclusion of probate orders therefore is optional and enacting jurisdictions may wish to examine their local legislation and decide whether they wish to rely on that or on UECJDA

The exclusion of judgments for fines and penalties carries forward the current law. They are not presently enforceable either through an action on the judgment or under reciprocal enforcement of judgment legislation.

The exclusion of orders of tribunals, in respect of non-monetary relief ensures that the scheme is confined to true court orders. Non-money orders made by tribunals are often intensely local in the policies they advance and unsuitable for interprovincial enforcement.

Not all judgments which satisfy the definition of "Canadian judgment" may be registered or enforced under the UECJDA. Other limitations are imposed in sections 2 and 5.

> **"enforcement" includes requiring that a Canadian judgment be recognized by any person or authority whether or not further relief is sought;**
>
> **"enforcing party" means a person entitled to enforce a Canadian judgment in the province or territory where the judgment was made;**
>
> **"registered Canadian judgment" means a Canadian judgment that is registered under this Act.**

*Right to register Canadian]udgment*

**2. (1) Subject to subsection (2) a Canadian judgment, whether or not the judgment is final, may be registered under this Act for the purpose of enforcement.**

**Comment:** This act embraces interim as well as final orders for non-monetary relief. A condition at common law for the enforcement of a foreign judgment was that the judgment had to be final. This requirement of finality is continued in subsection (2) for money judgments. In the context of non-money judgments, other considerations arise.

There is a whole range of interlocutory injunctions that might be issued in the course of a proceeding. For example, orders may be given designed to preserve or protect the subject matter of the litigation or maintain the status quo. The court may issue a Mareva injunction to prevent the defendants disposing of specified assets. Orders such as these would not meet the test of "finality" but that seems an insufficient reason to deny their enforcement outside the place where the order was made.

Moreover, in many instances when an injunction is sought, although the pleadings are drafted to claim a final injunction, the real battle is over whether or not an interim injunction should be granted. When an interim injunction is granted, very often no further steps are taken. The legislation recognizes this reality.

> **(2) A Canadian judgment that requires a person to pay money may not be registered under this Act for the purpose of enforcement unless it is a final judgment.**
>
> **(3) A Canadian judgment that also contains provisions for relief that may not be enforced under this Act may be registered under this Act except in respect of those provisions.**

**Comment:** This ensures that a judgment that provides for other relief is enforceable as to the provisions that are within this Act. For example an order made in a matrimonial proceeding may provide for maintenance, custody of children of the marriage, and limit the contact one spouse may have with the other. The last of those provisions would be enforceable under this Act. The other provisions would be enforced under other schemes.

*Procedure for registering Canadian] udgment*

**3. (1) A Canadian judgment is registered under this Act by paying the fee prescribed by regulation and by filing in the registry of the *[superior court of unlimited trial jurisdiction in the enacting province or territory]***

**(a) a copy of the judgment, certified as true by a judge, registrar, clerk or other proper officer of the court that made the judgment, and**

**(b) the additional information or material required by regulation.**

**Comment:** Section 3 (1) sets out the mechanics of registering a judgment under UECJDA. If more detailed guidance is desirable this may be done by regulation. *[See* section 10.] Registering a Canadian judgment is a purely administrative act

**(2) Law enforcement authorities acting in good faith may, without liability, rely on and enforce a purported Canadian judgment that**

**(a) was made in a proceeding between spouses or domestic partners having a similar relationship, and**

**(b) enjoins, restrains, or limits the contact one party may have with the other for the purpose of preventing harassment or domestic violence**

**whether or not the judgment has been registered in the *[superior court of unlimited trial jurisdiction in the enacting province or territory]* under subsection (1).**

**Comment:** Protection orders require some special treatment. In this context, enforcement is not so much a matter of invoking the assistance of the local court as it is in getting local law enforcement authorities to respond to a request for assistance. When the police are called on to intervene in a situation of domestic harassment their response may well turn on whether a valid protection order exists. If the police are satisfied on this point they may be prepared to act in marginal situations. If they are forced to rely solely on powers derived from the Criminal Code they may be reluctant to intervene except in cases where the potential violence or breach of the peace is beyond doubt.

The strategy of subsection (2) is to insulate the police from civil liability where they, in good faith, act on what purports to be a valid protection order. Those jurisdictions which have created and maintain an up-to-date central registry of protection orders on which the police normally rely may wish to consider alternative strategies.

*Effect of registration*

**4. Subject to sections 5 and 6, a registered Canadian judgment may be enforced in *[enacting province or territory]* as if it were an order or judgment of, and entered in, the *[superior court of unlimited trial jurisdiction in the enacting province or territory].***

**Comment:** Section 4 describes the effect of registration. It embodies the central policy of the UECJDA that Canadian judgments from outside the enacting province or territory should be enforceable as if made by a superior court of the enacting province or territory.

*Time limit for registration and enforcement*

**5. (1) A Canadian judgment that requires a person to pay money must not be registered or enforced under this Act**

**(a) after the time for enforcement has expired in the province or territory where the judgment was made; or**

**(b) later than [xxx] years after the day on which the judgment became enforceable in the province or territory where it was made.**

**Comment:** The limitation laws of most provinces adopt different limitation period to govern the enforcement of "foreign"judgments than that which governs local judgments. "Foreign" judgments are usually subject to a shorter limitation period. Section 5 embodies the policy that Canadian judgments should be treated no less favourably than local judgments of the enacting province or territory. Thus Canadian judgments should not be subject to any shorter limitation period than local judgments.

In setting a limitation period for the enforcement of judgments under the UECJDA section 5 adopts a dual test. First, enforcement proceedings must be brought within the limitation period applicable to local judgments, with time running from when the judgment was made. Second, proceedings on the judgment must not have become statute barred through the operation of a limitation period in the place where it was made.

xxx refers to the number of years as for enforcement of money judgments of the superior court of unlimited trial jurisdiction in the enacting province or territory.

**(2) Equitable doctrines and rules of law in relation to delay apply to the enforcement of a Canadian judgment, to the extent that it provides for relief other than the payment of money.**

**Comment:** Conduct such as delay in seeking enforcement might disentitle the enforcing party to relief.

*Application for directions*

**6. (1) A party to the proceeding in which a registered Canadian judgment was made may apply to the *[superior court of unlimited trial jurisdiction in the enacting province or territory]* for directions respecting its enforcement.**

**(2) On an application under subsection (1), the court may**

**(a) make an order that the judgment be modified as may be required to make it enforceable in conformity with local practice,**

**(b) make an order stipulating the procedure to be used in enforcing the judgment,**

**Comment:** Non-money judgments are frequently framed with reference to the enforcement machinery available in the place where they are made. This may not always be compatible with the enforcement machinery and practice in a different province where enforcement is sought. Enforcement of an extra-provincial judgment, according to its exact tenor, may be impossible. Section 6 (1) provides that a party may apply for directions as to the way in which a judgment is to be enforced. Section 6 (2) gives the enforcing court a generous power to "fine-tune" the judgment so that it may be enforced according to its intent.

**(c) make an order staying or limiting the enforcement of the judgment, subject to any terms and for any period the court considers appropriate in the circumstances, if**

**(i) such an order could be made in respect of an order or judgment of the *[superior court of unlimited trial jurisdiction in the enacting province or territory]* under [the statutes and the rules of court] *[any enactment of the enacting province or territory]* relating to legal remedies and the enforcement of orders and judgments,**

**Comment:** The policy of assimilating the enforcement of Canadian judgments to that of local judgments requires that the party against whom enforcement is sought be entitled to take advantage of any limitations which the law of the enacting province or territory may impose with respect to the enforcement of local judgments. This might include, for example, a power in the local court to order payment by installments. Section 6 (1) (a) clarifies the power of the local court to make orders of this character which limit the enforcement of a Canadian judgment.

**(ii) the party against whom enforcement is sought has brought, or intends to bring, in the province or territory where the Canadian judgment was made, a proceeding to set aside, vary or obtain other relief in respect of the judgment,**

**(iii) an order staying or limiting enforcement is in effect in the province or territory where the Canadian judgment was made, or**

**(iv) is contrary to public policy in *[the enacting province or territory].***

**Comment:** An order made under section 6 (2) (c) staying or limiting enforcement may be made for a temporary period and subject to any terms which may be necessary to protect the enforcing partys position. If an order is made under paragraph (ii), terms might be imposed to ensure that the party against whom enforcement is sought proceeds expeditiously. The court may, for example, set time limits or require the posting of security.

**(3) Notwithstanding subsection (2), the *[superior court of unlimited trial jurisdiction in the enacting province or territory]* shall not make an order staying or limiting the enforcement of a registered Canadian judgment solely on the grounds that**

**(a) the judge, court or tribunal that made the judgment lacked jurisdiction over the subject matter of the proceeding that led to the judgment, or over the party against whom enforcement is sought, under**

**(i) principles of private international law, or**

**(ii) the domestic law of the province or territory where the judgment was made,**

**(b) the *[superior court of unlimited trial jurisdiction in the enacting province or territory] would* have come to a different decision on a finding of fact or law or on an exercise of discretion from the decision of the judge or court that made the judgment, or**

**(c) a defect existed in the process or proceeding leading to the judgment.**

**Comment:** This provision gives specific effect to the full faith and credit policy of UECJDA. At common law, a local court whose assistance is sought in the enforcement of a foreign judgment may decline to give that assistance where it believes the foreign judgment is somehow flawed. In this context, a flaw might involve a lack of jurisdiction in the foreign court over the defendant or the dispute. It might, in some cases, involve the local court having a different view of the merits of the decision. A flaw might also include some defect in the process by which the foreign judgment was obtained such as a breach of natural justice or where there is a suggestion of fraud. Allowing the local court to inquire into such matters may be appropriate where the judgment emanates from a truly "foreign" place. It is quite inappropriate in Canada as it puts the courts of one province in the position of supervising the actions of the courts of another province. The Common law approach cannot co-exist with the full faith and credit concept.

UECJDA expressly abrogates the common law approach. Section 6(3) stipulates that none of the "flaws" described above provide grounds for staying or limiting the enforcement of a Canadian judgment. The proper course of a judgment debtor who alleges that the judgment is flawed is to seek relief in the place where the judgment was made, either through an appeal or a further application to the court or tribunal which made the judgment.

UECJDA does recognize that there are other circumstances which might justify staying or limiting the enforcement, such as where the judgment is truly flawed, and the judgment debtor is taking steps to obtain relief in the place it was made. This is provided for in section 6 (2) (c) (ii). The judgment debtor is likely to have a stronger claim for a stay if enforcement of the judgment has also been stayed in the place where it was made. [See section 6 (2) (c) (iii).]

**(4) An application for directions must be made under subsection (1) before any measures are taken to enforce a registered Canadian judgment where**

**(a) the enforceability of the judgment is, by its terms, subject to the satisfaction of a condition, or**

**(b) the judgment was obtained *ex parte* without notice to the persons bound by it.**

**Comment:** Subsection (4) sets Out particular instances in which directions must be sought. The first is where a judgment stipulates that some condition precedent must be satisfied before the judgment is enforceable. Typically, a judgment might require that a person bound by it receive notice of it before any enforcement proceedings may be taken. Section 6(4) requires that the enforcing party seek directions as to whether the condition has been satisfied for the purposes of enforcement within the enforcing province. The second instance is where the judgment sought to be enforced is an ex parte order.

*Interest on registered ]udgment*

**7. (1) To the extent that a registered Canadian judgment requires a person to pay money, interest is payable as if it were an order or judgment of the *[superior court of unlimited trial jurisdiction in the enacting province or territory].***

**(2) For the purpose of calculating interest payable under subsection (1), the amount owing on the registered Canadian judgment is the total of**

**(a) the amount owing on that judgment on the date it is registered under this Act; and**

**(b) interest that has accrued to that date under the laws applicable to the calculation of interest on that judgment in the province or territory where it was made.**

**Comment:** Section 7 provides that a registered judgment will earn interest as if it were a local judgment. The principal amount of the judgment is calculated by including post judgment interest that has accrued before registration.

*Recovery of registration costs*

**8. An enforcing party is entitled to recover all costs, charges and disbursements**

**(a) reasonably incurred in the registration of a Canadian judgment under this Act, and**

**(b) taxed, assessed or allowed by [the proper officer] of the *[superior court of unlimited trial jurisdiction in the enacting province or territory].***

**Comment:** Costs and disbursements incurred in the registration of a Canadian judgment are recoverable.

*Enforcing partys other rights not affected by registration*

**9. Neither registering a Canadian judgment nor taking other proceedings under this Act affects an enforcing partys right to bring an action on the original cause of action.**

**Comment:** An enforcing party is not required to elect irrevocably between options for enforcing a Canadian judgment. Section 9 preserves the right of the enforcing party to employ the UECJDA or to rely on whatever common law methods of vindicating rights are available. There is no reason to limit the enforcing partys options.

It is contemplated that some provinces and territories will retain legislation for the reciprocal enforcement of judgments. While this legislation will be overtaken by the UECJDA with respect to Canadian judgments it will still be necessary as a vehicle for the enforcement of judgments, on a reciprocal basis, with non-Canadian jurisdictions.

*Power to make regulations*

**10. The Lieutenant Governor in Council may make regulations [rules of court]**

**(a) prescribing the fee payable for the registration of a Canadian judgment under this Act,**

**(b) respecting additional information or material that is to be filed in relation to the registration of a Canadian judgment under this Act,**

**(c) respecting forms and their use under this Act, and**

**(d) to do any matter or thing required to effect or assist the operation of this Act.**

**Comment:** The regulation-making power in section 10 is self-explanatory. The regulation-making power in section 10 is self-explanatory.

*Application of Act*

**11. This Act applies to**

**(a) a Canadian judgment made in a proceeding commenced after this Act comes into force, and**

**(b) a Canadian judgment made in a proceeding commenced before this Act comes into force and in which the party against whom enforcement is sought took part.**

**Comment:** The application provision permits the retrospective application of the UECJDA to some judgments. It may be unfair to enforce, on a full faith and credit basis, a judgment made in a proceeding commenced before the UECJDA came into force. Unfairness could occur where a resident of the enacting province relied on well-founded legal advice to not respond to distant litigation since any resulting judgment would not (according to the law in force at the time) be enforceable outside the place where it was made. On the other hand, if that resident took part in the foreign proceeding there is little reason to deny the plaintiff the right to enforce the judgment under the UECJDA.

# *UNIFORM ENFORCEMENT OF CANADIAN JUDGMENTS AND DECREES ACT AMENDMENT ACT*

1. **1 The *Uniform Enforcement of Canadian Judgments and Decrees Act* is amended in section 1 in the definition of "Canadian judgment" by deleting paragraph (a) of the definition and substituting the following:**

**(a) that requires a person to pay money, including an order for the payment of money that is made in the exercise of a judicial function by a tribunal of a province or territory of Canada other than [enacting province or territory] and that is enforceable as a judgment of the superior court of unlimited trial jurisdiction in that province or territory,**

**Comment:** In the *Uniform Enforcement of Canadian Judgments and Decrees Act*, when first recommended, the definition of "Canadian judgment" expressly referred to restitution orders made under section 725 of the *Criminal Code*. The practice was that these orders would be registered in the superior court of the province or territory where the order was made. The former definition ensured that the machinery of the Act would be available to facilitate their enforcement in other parts of Canada.

In 1995, amendments were made to the Code to permit the registration of these restitution orders in the superior court of any province or territory in Canada so it would no longer be necessary to invoke the machinery of the Act. This housekeeping amendment updates the definition by deleting the now unnecessary reference to restitution orders.

# APPENDIX B
# *UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT*

**Short title**

**1.** This Act may be cited as the *Uniform Enforcement of Foreign Judgments Act.*

PART 1

INTERPRETATION AND APPLICATION

INTERPRETATION

**Definitions**

**2.** The definitions in this section apply in this Act.

**"civil proceeding"**

*« instance civile »*

**"civil proceeding"** means a proceeding to determine a dispute between two or more persons or entities -- one or more of whom may be a government body -- the object of which is an order or judgment that

(*a*) in the case of a violation of a right, requires a party to comply with a duty or pay damages; or

(*b*) in any other case, determines the personal status or capacity of one or more of the parties.

**"enforcing court"**

*« tribunal d'exécution »*

**"enforcing court"** means [*the superior court of unlimited trial jurisdiction in the enacting province or territory*].

**"foreign judgment"**

*« jugement étranger »*

**"foreign judgment"** means a final decision made in a civil proceeding by a court of a foreign State, rendered by means of a judgment, order, decree or similar instrument in accordance with the laws of that State. It includes a final decision

made by an adjudicative body other than a court if the enforcing court in [*the enacting province or territory*] is satisfied that the adjudicative body is the body that determines disputes of the kind in question in that State.

**"judgment creditor"**

*« créancier judiciaire »*

**"judgment creditor"** means the person entitled to enforce a foreign judgment.

**"judgment debtor"**

*« débiteur judiciaire »*

**"judgment debtor"** means the person liable under a foreign judgment.

**"registration"**

*« enregistrement »*

**"registration"** means the procedure prescribed by this Act or the regulations for the registration and enforcement of a foreign judgment.

**"State of origin"**

*« État d'origine »*

**"State of origin"** means the State or subdivision of a State where a foreign judgment was made.

**Comments:** As is customary the proposed uniform act on enforcement of foreign judgments includes a section on definitions. Most of them are self-explanatory.

In light of ULCC-Civil Section discussions, the scope of the future UEFJA is not limited to only foreign judgments that are final and monetary in nature (see the definition of "civil proceeding"). It was also decided that the Act would not include foreign provisional orders (see the definition of "foreign judgment" which limits the application of the Act to final decisions). Finally, the Act applies to foreign final judgments, even where such a judgment was not rendered by a court but rather by another adjudicative body, where the enforcing court in the province or territory adopting the Act is satisfied that the adjudicative body that rendered the decision was empowered to do so. Thus a decision rendered by an administrative tribunal could be covered by the Act if it arose from a civil proceeding and did not concern administrative law.

In terms of the procedure set out in the Act, the expression "registration" is used, but the definition here is intended to include any procedure by which a foreign judgment is made enforceable in the same manner as a local judgment. This would include, notably, the Quebec procedure under which an application is made to the

court to render the judgment executory in Quebec, and the court's order is the means by which this is achieved. It is immaterial for the purposes of the definition whether the "registration" is *ex parte*, with notice and an opportunity to oppose enforcement being given to the debtor afterwards, or the "registration" is made only after the debtor is given notice and an opportunity to oppose.

## APPLICATION

**Exceptions**

**3.** This Act does not apply to foreign judgments

(*a*) for the recovery of taxes;

(*b*) arising out of bankruptcy and insolvency proceedings as defined in Part XIII of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended;

(*c*) for maintenance or support;

(*d*) that recognize the judgment of another foreign State;

(*e*) for the recovery of monetary fines or penalties; or

(*f*) rendered in proceedings commenced before the coming into force of this Act.

**Comments:** Section 3 determines the scope of application of the Act by specifying the foreign judgments to which the Act does not apply. This list accords with the traditional list of exceptions to enforcement of foreign judgments in Canada (taxes, penalties), and also takes into account those judgments for which separate enforcement rules exist (insolvency, maintenance). Thus enforcement of foreign judgments on these matters will not be possible under the proposed UEFJA. However, enforcement of judgments on matters not mentioned in the list could be considered in compliance with the conditions set out in the Act.

The proposed UEFJA applies only to original foreign judgments and not to judgments recognizing a foreign judgment. Moreover, the proposed Act has no retroactive effect: only judgments obtained in proceedings commenced after the entry into force of the Act would be executable under its provisions.

PART 2

ENFORCEMENT -- GENERAL

**Reasons for refusal**

**4.** A foreign judgment cannot be enforced in [*the enacting province or territory*] if

(*a*) the court of the State of origin lacked jurisdiction over the judgment debtor or subject matter contrary to sections 8 and 9;

(*b*) the judgment has been satisfied;

(*c*) the judgment is not enforceable in the State of origin or an appeal is pending, or the time within which an appeal may be made or leave for appeal requested has not expired;

(*d*) the judgment debtor was not lawfully served in accordance with the laws of the State of origin or did not receive notice of the commencement of the proceeding in sufficient time to present a defence, and the judgment was allowed by default;

(*e*) the judgment was obtained by fraud;

(*f*) the judgment was rendered in a proceeding that was conducted contrary to the principles of procedural fairness and natural justice;

(*g*) the judgment is manifestly contrary to public policy in [*the enacting province or territory*];

(*h*) at the time the judgment was submitted for registration or an action for enforcement was commenced, a civil proceeding based on the same facts and having the same purpose

(i) was pending before a court in [*the enacting province or territory*], having been commenced before the civil proceeding that gave rise to the foreign judgment was commenced,

(ii) has resulted in a judgment or order rendered by a court in [*the enacting province or territory*], or

(iii) has resulted in a judgment or order rendered by a court of a foreign State, other than the State of origin, that meets the conditions for its registration and enforcement in [*the enacting province or territory*].

**Comments:** Section 4 lists in sub-par. (b) to (h) the traditional defences or exceptions which can be opposed to the enforcement of foreign final judgments in Canada. It includes notably the following circumstances: the foreign judgment is not final or is against public policy; the proceedings that were conducted show a lack of respect for the rights of the defendant; or *lis pendens* or *res judicata* can be

invoked. Unlike the policy governing the enforcement of Canadian judgments based on full faith and credit under the UECJA, enforcement of a foreign judgment could also be opposed if, as provided in sub-par. (a), the foreign court lacked jurisdiction.

**Paragraphs (e) and (f).** The defence of fraud that is referred to in paragraph (e) is intended to replicate, for common law jurisdictions, the defence as it has been developed in the Canadian case law. The defence is distinct from that of violation of the principles of procedural fairness as provided in paragraph (f). The procedural fairness defence refers to the manner in which the foreign proceeding was conducted. Fraud refers to a deception that was practised on the court or on the judgment debtor in order to obtain judgment. It is possible for fraud to exist even in an action that, as far as procedure is concerned, complies with the requirements of procedural fairness.

In civil law, fraud would have been covered either by section 4 f) or by section 4 g). Principles of procedural fairness would most likely be understood as binding on the parties to the proceedings as well as on the court. Fraud could also be contrary to public policy. Paragraph e) clarifies the issue if there were any doubt.

**Paragraph (g).** For common law jurisdictions, "public policy" is intended to refer to the concept that is used in the Canadian case law to determine whether a foreign judgment must be denied recognition, or a foreign rule of law denied application. Public policy, used in this sense, applies only if the foreign judgment or rule violates concepts of justice and morality that are fundamental to the legal system of the recognizing jurisdiction. The word "manifestly" is used in this paragraph to emphasize that the incompatibility with justice and morality must be convincingly demonstrated. Public policy in this context is clearly distinct from public policy in the more general sense of the aims that are supposed to be served by a rule of domestic law. A foreign judgment may be at odds with domestic legislative policy, because it gives a different result from that which domestic law would produce, but that does not mean that the judgment contravenes public policy in the sense in which it is used here. The distinction corresponds to that drawn in the civil law between *ordre public interne* (policies served by rules of domestic law) and *ordre public international* (public policy in the international sense).

Subsection 4 (h) (i) addresses the situation where *lis pendens* in the enforcing court can be invoked based on either an originating process or an interlocutory proceeding the subject matter of which is related to the merits addressed in the foreign proceeding.

Subsection 4 (h) (ii) addresses the straightforward exception of *res judicata* based on an equivalent judgment on the merits in the enforcing court. It also addresses the possibility of interim unenforceability created by the existence of an order in the enforcing court resulting from an interlocutory proceeding the subject matter of

which is related to the merits addressed in the foreign proceeding. In such a case, the interlocutory matter would have to be disposed of by the enforcing court in advance of it considering the enforcement proceeding any further.

Subsection 4 (h) (iii) addresses the situation of *res judicata* in a third jurisdiction coming to the attention of the enforcing court, the judgment of which jurisdiction would also qualify for recognition and enforcement.

**Time periods**

**5.** A foreign judgment can be enforced in [*the enacting province or territory*] only within the period provided by the law of the State of origin, or within ten years after the day on which the foreign judgment becomes enforceable in that State, whichever is earlier.

**Comments:** Such a rule accords with the average limitation period for enforcement of judgments set up in most provinces.

**Limit of damages**

**6.** (1) Where the enforcing court, on application by a judgment debtor, determines that a foreign judgment includes an amount added to compensatory damages as punitive or multiple damages or for other non-compensatory purposes, it shall limit enforcement of the damages awarded by the foreign judgment to the amount of similar or comparable damages that could have been awarded in [*the enacting province or territory*.]

**Excessive damages**

(2) Where the enforcing court, on application by the judgment debtor, determines that a foreign judgment includes an amount of compensatory damages that is excessive in the circumstances, it may limit enforcement of the award, but the amount awarded may not be less than that which the enforcing court could have awarded in the circumstances.

**Costs and Expenses**

(3) In this section, a reference to damages includes the costs and expenses of the civil proceeding in the State of origin.

**Comments:** The enforcement in Canada of foreign awards of damages which could include punitive, multiple or excessive compensatory damages that would otherwise be considered enforceable under this Act has raised and continues to raise a number of issues. This situation warrants that under the UEFJA the enforcing Canadian court being expressly empowered to limit the enforcement of damages so awarded that would be in excess of similar damages that could be awarded in similar circumstances had the action been filed in Canada. The

defendant would have the onus of establishing that the damages awarded by the foreign court are in excess of awards normally granted in Canada.

To clarify the rules, a distinction is made in s. 6 between punitive and multiple damages (para. 1) which are not considered compensatory, on the one hand, and excessive compensatory damages (para. 2) on the other, given the principles set forth by the S.C.C. in *Hill v. Church of Scientology*. In addition, the third paragraph provides that judicial costs and expenses are part of the damages award of which the enforcement could be limited.

**Limits relating to non-monetary awards**

**7.** (1) In the case of a non-monetary foreign judgment, the enforcing court may, on application by any party,

(*a*) make an order that the foreign judgment be modified as may be required to make it enforceable in [*the enacting province or territory*], unless the foreign judgment is not susceptible of being so modified;

(*b*) make an order stipulating the procedure to be used in enforcing the foreign judgment;

(*c*) make an order staying or limiting the enforcement of the foreign judgment, subject to any terms and for any period the enforcing court considers appropriate in the circumstances, if

(i) the enforcing court could have made that order with respect to an order or judgment rendered by it under [the statutes and the rules of court] [*any enactment of the enacting province or territory*] relating to legal remedies and the enforcement of orders and judgments, or

(ii) the judgment debtor has brought, or intends to bring, in the State in which the foreign judgment was made, a proceeding to set aside, vary or obtain other relief in respect of the foreign judgment.

**Application**

(2) An application must be made under subsection (1) before any measures are taken to enforce a foreign judgment where

(*a*) the enforceability of the foreign judgment is, by its terms, subject to the satisfaction of a condition; or

(*b*) the foreign judgment was obtained without notice to the persons bound by it.

**Comments:** The rules in section 7 are necessary to deal with special issues raised by non-monetary foreign judgments or, more precisely, foreign judgments containing orders that require the judgment debtor to do something other than pay

a sum of money to the judgment creditor. An order to pay money is readily translated into the local procedure. An order made by a foreign court to do something else (such as an order for specific performance), or to refrain from doing something (an injunction), may not have an exact equivalent in the enforcing court's own procedure. Also, non-monetary orders may involve issues of policy and convenience not raised by money judgments, such as the extent to which it is fair to restrain the judgment debtor's freedom to act, or appropriate to place a burden on the court to monitor the judgment debtor's conduct.

The provisions in section 7 are modeled on the corresponding ones in the Uniform Enforcement of Canadian Judgments and Decrees Act (UECJDA) (s. 6(2) and (4) of that Act). Paragraphs (a) and (b) of section 7(1) provide a mechanism whereby any party can ask the enforcing court to modify a foreign judgment, which is not enforceable in the enforcing jurisdiction as it stands, so as to make it enforceable (paragraph (a)), or to stipulate the procedure for enforcement (paragraph (b)). The concluding words in paragraph (a), which have no equivalent in the UECDJA, expressly contemplate that some foreign judgments may be so out of keeping with the relevant procedures in the enforcing jurisdiction that they are just not capable of being adapted so as to make them enforceable.

Paragraph (c) gives the enforcing court discretion, on application by any party, to stay or limit the enforcement of a non-monetary foreign judgment in either of two circumstances. One is where the enforcing court's own procedure would allow a local order of the relevant type to be stayed or limited in this way. This is consistent with the policy expressed in section 14(2) that the enforcing court must have the same control over a registered foreign judgment as it does over one of its own judgments. The other circumstance is where the judgment debtor has taken or intends to take steps in the originating jurisdiction to set aside, vary or obtain relief in respect of the foreign judgment. This recognizes that relief from a non-monetary judgment can often be sought by procedures other than an appeal, so the rule in section 4(c), prohibiting enforcement of a foreign judgment while an appeal is pending or may still be brought, will not cover all the situations that can arise.

Section 7(2) stipulates two cases in which the judgment creditor, as a precondition of taking any steps to enforce a non-monetary foreign judgment, must make an application to the enforcing court under subsection (1). In effect, the judgment creditor must ask the court to approve the way in which the creditor proposes that the foreign judgment be enforced. One case (paragraph (a)) is where the foreign judgment by its own terms is subject to the satisfaction of a condition, making it essential that the enforcing court have an opportunity to rule on whether that condition is satisfied. The other (paragraph (b)) is where the foreign judgment was obtained without notice to the persons bound by it. In such a case, since the judgment debtor has not had the opportunity to contest the making of the order, enforcement should not take place without at least the express sanction of the enforcing court.

**Jurisdiction**

**8.** A court in the State of origin has jurisdiction in a civil proceeding that is brought against a person if

(*a*) the person expressly agreed to submit to the jurisdiction of the court;

(*b*) as defendant, the person submitted to the jurisdiction of the court by appearing voluntarily;

(*c*) the person commenced a counterclaim to the proceeding;

(*d*) the person, being a natural person, was ordinarily resident in the State of origin;

(*e*) the person, not being a natural person, was incorporated in the State of origin, exercised its central management in that State or had its principal place of business located in that State; or

(*f*) there was a real and substantial connection between the State of origin and the facts on which the proceeding was based.

**Comments:** Section 8 sets out three groups of circumstances in which a foreign court has jurisdiction in a proceeding brought in its courts.

The first group describes party choice - the parties may contractually agree on a forum; the defendant may voluntarily appear in a forum chosen by the plaintiff; or, for purposes of orders against the plaintiff, the plaintiff is bound by the choice of forum it has made.

The second group describes the "home base" of defendants, using the accepted principle of habitual residence. For business entities, an equivalent is created by use of "place of incorporation," which is the place which gives the entity its existence and personality. Since such legal entities always act through agents, two additional grounds are added for business entities - "central management" and "principal place of business." These are consistent with decisions which have gone beyond a simplistic reliance on "place of incorporation" for all purposes. Almost all incorporation statutes mandate being subject to the authority of the courts of the place of incorporation. "Central management" and "principal place of business" depend on the particular circumstances of the case and the issues raised by it.

The third ground reflects the development of jurisprudence by the Supreme Court in *Morguard* and subsequent cases. The concept was developed with respect to recognition within Canada of other Canadian judgments. It has, however, been applied to non-Canadian judgments, even though the arguments relating to the comity between units within a federal state are less compelling in other circumstances. This issue has been discussed at differing levels of intensity in a number of cases, including *Moses* v. *Shore Boat Builders Ltd.*,[1] *Old North State*

*Brewing Company* v. Newlands Services Inc.,[2] *Braintech, Inc.* v. *Kostiuk*[3] and *U.S.A.* v. *Ivey*.[4] The concept of "real and substantial connection" is well known in conflict of laws generally.

**Real and substantial connection**

**9.** For the purposes of paragraph 8(*f*), in the case of a foreign judgment allowed by default, a real and substantial connection between the State of origin and the facts on which the civil proceeding was based is established in, but is not limited to, the following cases:

(*a*) the judgment debtor, being a defendant in the court of the State of origin, had an office or place of business in that State and the proceedings were in respect of a transaction effected through or at that office or place;

(*b*) in an action for damages in tort or for extra-contractual damages

(i) the wrongful act occurred in the State of origin, or

(ii) injury to person or property was sustained in the State of origin, provided that the defendant could have reasonably foreseen that the activity on which the action was based could result in such injury in the State of origin, including as a result of distribution through commercial channels known by the defendant to extend to that State;

(*c*) the claim was related to a dispute concerning title in an immovable property located in the State of origin;

(*d*) in an action for damages in contract, the contractual obligation was or should have been performed in the State of origin;

(*e*) for any question related to the validity or administration of a trust established in the State of origin or to trust assets located in that State, the trustee, settlor or beneficiary had his or her ordinary residence or its principal place of business in the State of origin; or

(*f*) the claim was related to a dispute concerning goods made or services provided by the judgment debtor and the goods and services were acquired or used by the judgment creditor when the judgment creditor was ordinarily resident in the State of origin and were marketed through the normal channels of trade in the State of origin.

**Comments:** It was felt necessary for policy reasons to provide a list of examples of real and substantial connections in order to establish the subject-matter competence of the foreign court. Grounds are identified here for actions involving branches of corporate bodies (a); torts (b); immovables (c); contracts (d); trusts (e); consumer contracts and products liability (f). They would largely accord with those

identified in the context of the enforcement of Canadian judgments (see s. 10 UCPTA).

As a result of the discussions held in August 1998, section 9 is intended to operate :

- only in the case of default judgments; and

- in a non-exhaustive fashion so that additional grounds which would be acceptable both in the State of origin and in Canada could be considered by the enforcing court.

Paragraph (a) should be read together with s. 8(e). The latter provides, in essence, that a court in the state of origin has jurisdiction in a proceeding against a corporation whenever that body is headquartered in the state of origin. This is general jurisdiction, that is, jurisdiction irrespective of the subject matter of the proceeding. Section 9(a), by contrast, is more restricted. It applies if the judgment debtor, which may be a natural person or a corporation, has an office or place of business in the territory of origin. The office or place of business need not be a principal one. Section 9(a) provides that a court in the state will have jurisdiction to give default judgment against the judgment debtor, based on a real and substantial connection, but this is special jurisdiction. That is, jurisdiction exists only with respect to certain proceedings. The proceeding must be "in respect of a transaction effected through or at that office or place". The word "transaction" implies a business context, but a proceeding "in respect of a transaction" could be for contractual, tortious (delictual) or restitutionary claims, so long as the claims arise out of a "transaction" effected through or at the relevant location.

**Judgment not enforceable**

**10.** A foreign judgment may not be enforced in [*the enacting province or territory*] if the judgment debtor proves to the satisfaction of the enforcing court that

(*a*) there was not a real and substantial connection between the State of origin and the facts on which the civil proceeding was based; and

(*b*) it was clearly inappropriate for the court in the State of origin to take jurisdiction.

**Comments:** Section 10 recognizes that there will be exceptional cases where the basis for jurisdiction can be found under Section 8(a) to (e), but nonetheless the exercise of jurisdiction by the court in the State of origin was clearly inappropriate. In those rare instances, the enforcing court may decline to recognize or enforce the judgment. A real and substantial connection between the State of origin and the facts on which the proceeding was based is not necessary for the court in the State of origin to have exercised jurisdiction but its absence, coupled with a finding that for some reason it was inappropriate for it to have done so, may be a sufficient reason to decline to enforce or recognize the judgment.

Section 10 provides the ultimate possibility at the enforcement stage to challenge the jurisdiction of the foreign court even though the defendant was not successful in challenging jurisdiction or has not done so at the time of the initial proceeding.

On that point, a useful reference can be made to s. 3164 of the Civil Code of Québec which reads as follows:

"The jurisdiction of foreign authorities is established in accordance with the rules on jurisdiction applicable to Québec authorities under Title Three of this Book, to the extent that the dispute is substantially connected with the State whose authority is seised of the case." (our emphasis)

As pointed out during the deliberations of the ULCC-Civil Section in August 1998, the application of s. 10 should be appreciated as clearly as possible, particularly in light of its relationship with other sections of Part II that deal with jurisdiction, namely s. 4, 8 and 9.

In principle, the enforcement of a foreign judgment can be granted if the foreign court was competent to make a final order in accordance with the rules to be set out in the future UEFJA. Defences to enforcement are those listed in s. 4, one of which being the lack of jurisdiction. This has to be determined in light of the requirements mentioned in s. 8 and 9.

For instance, if jurisdiction can be determined on the basis of a real and substantial connection as provided in s. 8(f), examples of which are contained in s. 9 in the case of default judgments, the defendant would not be successful in establishing that the foreign court lacked jurisdiction. For this reason, it might be necessary to adopt quite a high threshold for allowing the defendant to be able to do so.

**Recognition of foreign judgments**

**11.** The rules in this Part that determine whether a foreign judgment is unenforceable for lack of jurisdiction in the court of the State of origin over a party or subject matter, or on account of fraud, public policy or a violation of the principles of procedural fairness and natural justice, also apply, with any necessary modifications, in determining whether a foreign judgment is binding on the parties so as to be a defence to a claim, or to be conclusive of an issue, in an action in [*the enacting province or territory*].

**Comments:** It is recognized that enforcement and recognition operate in similar ways, one initiated by the successful plaintiff/judgment creditor, and the other by the successful defendant. However, recognition operates in a narrower compass, especially where the foreign action is dismissed. It is possible that the unsuccessful plaintiff may attempt to sue again in another forum or appeal the foreign judgment. In the meantime, however, the successful defendant in the foreign litigation must be able to rely on the judgment dismissing the action to prevent a new action

(estoppel in common law), unless and until circumstances are shown to have changed.

Because recognition operates in a slightly narrower compass, we have indicated the grounds which would preclude the foreign action being raised by the successful defendant.

## PART 3

## ENFORCEMENT PROCEDURES

**Right to register**

**12.** (1) A foreign judgment that is enforceable under this Act may be registered under this Part.

**Multiple claims**

(2) If a foreign judgment contains parts that may be enforced separately, the judgment creditor may register the judgment in respect of those parts at different times.

**Notice to judgment debtor**

(3) The judgment creditor must give to the judgment debtor a notice of intention to register a foreign judgment in respect of one or more of its parts

(*a*) indicating which of the grounds set out in section 8 are being relied on to claim that the court in the State of origin had jurisdiction to make the foreign judgment; and

(*b*) identifying the parts.

**Registration procedure**

(4) A judgment creditor may register a foreign judgment by filing with the enforcing court

(*a*) a copy of the foreign judgment certified as true by a proper officer of the court that made the order;

(*b*) a copy of each notice referred to in subsection (3);

(*c*) an application to modify the foreign judgment, if the judgment creditor is of the opinion that the judgment must be amended by the enforcing court to render it enforceable; and

(*d*) a certified translation of the foreign judgment into either English or French, if it was not given in one of those languages.

**Costs and expenses**

(5) The judgment creditor may, if the regulations so provide, recover from the judgment debtor the costs and expenses related to the registration of the foreign judgment.

**Comments:** Part III of the Act reflects a compromise between two approaches to defining the procedure for enforcement of foreign judgments. One approach would leave the procedure entirely to be defined by the enacting jurisdiction, whether by regulation or by statutory provision. This would allow too much variation from one province or territory to another. The other would define the procedure exhaustively in the model Act. This would create difficulties in terms of harmony with long-established procedures in each jurisdiction. The compromise proposed here is to set certain parameters for the procedure but to recognize the need to accommodate existing differences to a certain extent. Additionally, the Act allows the general civil enforcement rules to operate as much as possible, recognizing that work to achieve uniformity there is underway.

Section 12 sets out the procedural steps for registration. The Act recognizes that for a variety of reasons a judgment creditor may wish to seek *enforcement* of only part of a judgment, a matter covered in section 14(2). Subsection (2) of section 12 ensures that the judgment creditor can also *register* with respect to part of a judgment and can do so on difference occasions for the different parts, subject to the notice provisions. Subsection (3) requires the judgment creditor to notify the judgment debtor of the intention to register, to inform the latter of the jurisdictional grounds under section 8 that are relied upon and to identify the parts of the judgment with respect to which registration is sought. Subsection (4) sets out the documents that must be provided to the court: a certified copy of the foreign judgment, translated into English or French if necessary; a copy of the notice to the judgment debtor; and, where the judgment creditor considers that the foreign judgment requires modification in order to be enforceable as if it were an order contained in a local judgment, an application that would set out the modifications proposed. Finally, subsection (5) adds to these informational requirements a substantive provision that the enacting jurisdiction may (or may choose not to) provide, in the regulations under the Act, for the recovery by the judgment creditor from the judgment debtor of costs in relation to the registration procedure.

**Conversion to Canadian currency**

**13.** (1) Where a foreign judgment orders the payment of a sum of money expressed in a currency other than Canadian currency, when the judgment is registered it

must include a statement that the money payable under the judgment will be the amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in [*the enacting province or territory*] at the close of business on the conversion date.

**Conversion date**

(2) For the purposes of subsection (1), the conversion date is the last day, before the day on which the judgment debtor makes a payment to the judgment creditor under the registered foreign judgment, on which the bank quotes a Canadian dollar equivalent to the other currency.

**Comments:** Section 13 adopts the policy of the Uniform Foreign Money Claims Act respecting the date of conversion of foreign currency to Canadian currency. This is consistent with the common law rule (the "date of payment" rule) adopted by the House of Lords in the Miliangos case. The policy is that the conversion to Canadian dollars shall take place at the rates prevailing at the time of payment. This is also the currency conversion date in Section 31 of the British Columbia Court Order Enforcement Act respecting the reciprocal enforcement of foreign judgements. It is the fairest conversion date based on the principle that the creditor is most accurately compensated by receiving, possibly years after the foreign judgment, the amount of foreign currency stipulated by the judgment or the Canadian dollars that are needed, as of the time of payment, to purchase that amount of foreign currency.

**Enforcement**

**14.** (1) On registration, a foreign judgment is enforceable as if it were a judgment of the enforcing court.

**Jurisdiction of enforcing court**

(2) An enforcing court has the same jurisdiction and control over a registered foreign judgment as it has over its own judgments and may order enforcement in respect of one or more of its parts.

**Enforcement by sale of property**

(3) A registered foreign judgment may not be enforced by the sale or other disposition of any property of the judgment debtor before the expiry of 30 days after the judgment debtor has received notice of the proceedings to register the foreign judgment, or any longer period that the enforcing court may allow.

**Comments:** Section 14 is for greater certainty, to remove any doubt that, on registration, a foreign judgment is the functional and juridical equivalent of a judgment emanating at first instance from the enforcing court. This status applies to the foreign judgment as a whole or in part depending on and as per the

enforcement procedures that have been completed pursuant to section 12 of the Act. Subsection 14(3) provides a grace period before a judgment creditor can satisfy all or part of a registered foreign judgment through the enforced sale of a judgment debtor's property, but this is intended to provide a judgment debtor only with reasonable notice of the likely consequences of registering a foreign judgment and in no way qualifies the legal status, force or ultimate effect of the registration itself.

**Interest**

**15.** (1) The interest payable on an amount awarded under a registered foreign judgment is

(*a*) the interest accruing on that amount under the law of the State of origin, starting on the day on which the foreign judgment became enforceable in that State and ending on the day immediately before the conversion date; and

(*b*) the interest accruing on that amount under the law of [*the enacting province or territory*], starting on the conversion date and ending on the day on which the judgment debtor makes a payment to the judgment creditor under the registered foreign judgment.

**Variation of interest**

(2) The enforcing court, if it considers it necessary to do so to ensure that the judgment creditor will be most truly and exactly compensated, may order that the interest be calculated in a different manner.

**Comments:** The provision respecting interest is based on the principle that the rule for post-foreign judgment interest should parallel the rule respecting currency conversion in Section 13. That is, the foreign judgment should bear interest at the relevant foreign interest rate until the date as of which the obligation is converted from the foreign currency into Canadian currency, and after that date should bear interest at the same rate as a local judgment. Thus, if the original jurisdiction has a rapidly devaluing currency, it would usually have a correspondingly high interest rate, and the foreign judgment ought to bear interest at that rate as long as the obligation is denominated in that currency, i.e., up to the date of conversion. After the date of conversion into Canadian currency, the relevant local interest rate is appropriate.

The alternative solution provided for in Sections 2 and 3 of the Uniform Foreign Money Claims Act, that is, of allowing the matter of interest to be dealt with by regulation would be less satisfactory from the perspective of a uniform approach.

Subsection (2) allows a court to vary the interest rate if it considers that the application of the stipulated rule would overcompensate or undercompensate the judgment creditor.

## PART 4

## REGULATIONS

**Regulations**

**16.** The [*regulation-making authority of the enacting province or territory*] may make any regulations that the [*regulation-making authority of the enacting province or territory*] considers necessary to carry into effect the purposes and provisions of this Act.

## ENDNOTES

1. (1993), 106 D.L.R. (4th) [1994] 1 W.W.R. 112 (B.C.C.A.) [leave to appeal to the Supreme Court of Canada dismissed without reasons]

2. (1998), 155 D.L.R. (4th) 250, 47 B.C.L.R. (3d) 258 ( C.A.)

3. (1999), 171 D.L.R. (4th) [1999] 9 W.W.R. 133 (B.C.C.A.) [leave to appeal to the Supreme Court of Canada dismissed without reasons]

4. (1995), 26 O.R. (3d) 533, affirmed (1996), 30 O.R. (3d) 370 (Ont. C.A.).

# APPENDIX C
# *UNIFORM COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT*

*(1994 Proceedings at page 48)*

Contents

INTRODUCTORY COMMENTS.

0.1. This proposed uniform Act has four main purposes:

(1) to replace the widely different jurisdictional rules currently used in Canadian courts with a uniform set of standards for determining jurisdiction;

(2) to bring Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077, and *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897;

(3) by providing uniform jurisdictional standards, to provide an essential complement to the rule of nation-wide enforceability of judgments in the uniform *Enforcement of Canadian Judgments Act*; and

(4) to provide, for the first time, a mechanism by which the superior courts of Canada can transfer litigation to a more appropriate forum in or outside Canada, if the receiving court accepts such a transfer.

0.2. To achieve the first three purposes, this Act would, for the first time in common law Canada, give the substantive rules of jurisdiction an express statutory form instead of leaving them implicit in each province's rules for service of process. In the vast majority of cases this Act would give the same result as existing law, but the principles are expressed in different terms. Jurisdiction is not established by the availability of service of process, but by the existence of defined connections between the territory or legal system of the enacting jurisdiction, and a party to the proceeding or the facts on which the proceeding is based. The term "territorial competence" has been chosen to refer to this aspect of jurisdiction (section 1, "territorial competence") and distinguish it from other jurisdictional rules relating to subject-matter or other factors (section 1, "subject matter competence").

0.3. By including the transfer provisions in the same statute as the provisions on territorial competence, the Act would make the power to transfer, along with the power to stay proceedings, an integral part of the means by which a Canadian court can deal with proceedings that more appropriately should be heard elsewhere. The provisions on transfer owe a great debt to the uniform *Transfer of Litigation Act* ("UTLA") promulgated in 1991 by the United States National Conference of Commissioners on Uniform State Laws.

## PART 1 : INTERPRETATION

### Definitions

1. In this Act

**"person"** includes a state;

**"plaintiff"** means a person who commences a proceeding, and includes a plaintiff by way of counterclaim or third party claim;

**"proceeding"** means an action, suit, cause, matter or originating application and includes a procedure and a preliminary motion;

**"procedure"** means a procedural step in a proceeding;

**"state"** means

(a) Canada or a province or territory of Canada, and

(b) a foreign country or a subdivision of a foreign country;

**"subject matter competence"** means the aspects of a court's jurisdiction that depend on factors other than those pertaining to the court's territorial competence;

**"territorial competence"** means the aspects of a court's jurisdiction that depend on a connection between

(a) the territory or legal system of the state in which the court is established, and

(b) a party to a proceeding in the court or the facts on which the proceeding is based.

### COMMENTS TO SECTION 1

1.1. The term "person" is used in the generic sense throughout the statute. The term covers natural persons, corporate entities and states or Crown agencies.

1.2. "Proceeding" is broadly defined to include interlocutory matters and even motions which are brought preliminary to formal commencement of an action, for example, an anti suit injunction.

1.3. "State" is defined for two purposes. One is to complement the definition of "territorial competence", which refers to connections with the territory or legal system of the "state" in which the court is established. The other is to make it clear that the power of transfer under Part 3 extends to transfers to and from countries outside Canada, or subdivisions of those countries. There was extensive debate at the Conference about whether the transfer provisions should extend to courts outside Canada. This debate is summarized in the comments to section 13.

1.4. The rationale for adopting the term "territorial competence" is noted in comment 2. The definition is the key to the legal effect of the rules in Part 2, defining Canadian courts' territorial competence.

1.5. "Subject matter competence" is defined to include all aspects of a court's jurisdiction other than those relating to territorial competence. It will thus include restrictions on a court's authority relating to the nature of the dispute, the amount in issue, and other criteria that are unrelated to the territorial reach of the court's authority. The distinction between "territorial competence" and "subject matter competence" is important in certain of the transfer provisions in Part 3.

## PART 2 : TERRITORIAL COMPETENCE OF COURTS OF [*ENACTING PROVINCE OR TERRITORY*]

**Application of this Part**

**2.** (1) In this Part, **"court"** means a court of [*enacting province or territory*].

(2) The territorial competence of a court is to be determined solely by reference to this Part.

**COMMENTS TO SECTION 2.**

2.1. Part 2 is drafted so as to define the territorial competence of any court of the enacting jurisdiction. This may be subject to rules in any other statute that give a particular court a wider or narrower territorial competence than the rules in this Act (see section 12). The transfer provisions in Part 3 are drafted so as to apply only to the superior court of unlimited jurisdiction (see the note after the heading of Part 3).

2.2. Subsection 2(2) is intended to make it clear that a court's territorial competence is to be determined according to the rules in the Act and not according to any "common law" jurisdictional rules that the Act replaces.

2.3. The Act defines a court's territorial competence "in a proceeding" (section 3). It does not define the territorial aspects of any particular remedy. Thus the Act does not supersede common law rules about the territorial limits on a remedy, such as the rule that a Canadian court generally will not issue an injunction to restrain conduct outside the court's own province or territory.

2.4. The Act only defines territorial competence; it does not define subject matter competence. It is not intended to affect any rules limiting a Canadian court's jurisdiction by reference to the amount of a claim, the subject matter of a claim, or any other factor besides territorial connections.

**Proceedings in personam**

**3.** A court has territorial competence in a proceeding that is brought against a person only if

(a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,

(b) during the course of the proceeding that person submits to the court's jurisdiction,

(c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,

(d) that person is ordinarily resident in [*enacting province or territory*] at the time of the commencement of the proceeding, or

(e) there is a real and substantial connection between [*enacting province or territory*] and the facts on which the proceeding against that person is based.

COMMENTS TO SECTION 3.

3.1. Section 3 defines the five grounds on which a court has territorial competence in a proceeding *in personam*. Paragraphs (a), (b) and (c) include the three ways in which the defendant may consent to the court's jurisdiction: by invoking the court's jurisdiction as plaintiff, by submitting to the court's jurisdiction during the proceedings, or by having agreed that the court shall have jurisdiction. These reflect long-standing law. Paragraphs (d) and (e) change current law, by replacing the criterion of *service of process* with the criterion of substantive *connection* with the enacting jurisdiction.

3.2. Paragraph (d) is effectively the replacement for the existing rule that a court has jurisdiction over any person that is served with process in the forum province or territory. Replacing *service* in the territory of the forum court with *ordinary residence* in that territory means that a person who is only temporarily in the jurisdiction will not automatically be subject to the court's jurisdiction. For a court to take jurisdiction over a person who is not ordinarily resident in its territory and does not consent to the court's jurisdiction, a real and substantial connection must exist within paragraph (e). The current rule, which (subject to arguments of *forum non conveniens*) permits a court to take jurisdiction on the basis of the defendant's presence alone, without any other connection between the forum and the litigation, will therefore no longer apply. This change in the existing rule is proposed not only on the ground of fairness, but also because the existing rule is of doubtful constitutional validity, since a defendant's mere presence in a province is probably not enough to support the constitutional authority of a province to assert judicial jurisdiction over the defendant.

3.3. Paragraph (e) replaces the existing rules, in the common law provinces, relating to service *ex juris*. Territorial competence will depend, not on whether a defendant can be served *ex juris* under rules of court, but on whether there is, substantively, a real and substantial connection between the enacting jurisdiction and the facts on which the proceeding in question is based. This provision would bring the law on

jurisdiction into line with the concept of "properly restrained jurisdiction" that the Supreme Court of Canada, in *Morguard Investments Ltd.* v. *De Savoye* (1990), held was a precondition for the recognition and enforcement of a default judgment throughout Canada. The "real and substantial connection" criterion is therefore an essential complement to the uniform *Enforcement of Canadian Judgments Act*, which requires all Canadian judgments to be enforced without recourse to any jurisdictional test. The present Act, if adopted, will ensure that all judgments will satisfy the Supreme Court's criterion of "properly restrained" jurisdiction, which the court laid down as the indispensable requirement for a judgment to be entitled to recognition at common law throughout Canada.

3.4. If the present Act is adopted, rules of court will still include rules as to service of process, but these will no longer be the source and definition of the court's territorial competence. Their role will be restricted to ensuring that defendants, whether ordinarily resident in or outside the jurisdiction, receive proper notice of proceedings and a proper opportunity to be heard.

**Proceedings with no nominate defendant**

**4.** A court has territorial competence in a proceeding that is not brought against a person or a vessel if there is a real and substantial connection between [*enacting province or territory*] and the facts upon which the proceeding is based.

**COMMENTS TO SECTION 4.**

4.1 This section deals with several miscellaneous actions where the proceedings are "technically *in personam*" but there is not, or is not yet an identified "persona" whose connection with the territory founds jurisdiction. In actions such as preliminary estate matters or correction of a corporate register, it is the proceeding rather than a nominal defendant which is the crucial factor. The section is broken out from the main section to emphasize this point.

**Proceedings in rem**

**5.** A court has territorial competence in a proceeding that is brought against a vessel if the vessel is served or arrested in [*enacting province or territory*].

**COMMENTS TO SECTION 5.**

5.1 Section 5 codifies the existing rule that jurisdiction in an action *in rem*, which can be brought only against a vessel, depends upon the presence of the vessel within the jurisdiction. Actions *in rem* are primarily brought in the Federal Court under its admiralty jurisdiction, but concurrent jurisdiction over maritime matters exists in the courts of the provinces. [The wording was amended in 1995 - see 1995 Proceedings at page 43.]

**Residual discretion**

**6.** A court that under section 3 lacks territorial competence in a proceeding may hear the proceeding despite that section if it considers that

(a) there is no court outside [*enacting province or territory*] in which the plaintiff can commence the proceeding, or

(b) the commencement of the proceeding in a court outside [*enacting province or territory*] cannot reasonably be required.

**COMMENTS TO SECTION 6.**

6.1 This section creates a residual discretion to act, notwithstanding the lack of jurisdiction under normal rules, provided that the conditions in (a) or (b) are met. Residual discretion permits the court to Act as a "forum of last resort" where there is no other forum in which the plaintiff could reasonably seek relief. The language tracks that of Article 3136 of the Quebec Civil Code.

See also note 10.3.

**Ordinary residence - corporations**

**7.** A corporation is ordinarily resident in [*enacting province or territory*], for the purposes of this Part, only if

(a) the corporation has or is required by law to have a registered office in [enacting province of territory],

(b) pursuant to law, it

(i) has registered an address in [*enacting province or territory*] at which process may be served generally, or

(ii) has nominated an agent in [*enacting province or territory*] upon whom process may be served generally,

(c) it has a place of business in [*enacting province or territory*], or

(d) its central management is exercised in [*enacting province or territory*].

**COMMENTS TO SECTION 7.**

7.1. Sections 7, 8 and 9 define ordinary residence for corporations, partnerships and unincorporated associations. They reflect, with only minor modifications, the approach that is generally taken under existing law to decide whether these defendants are present in the jurisdiction for the purposes of service.

7.2. This Act contains no definition of ordinary residence for natural persons. This connecting factor is widely used in Canada (for example, as the jurisdictional criterion in the *Divorce Act* (Can.)), and has been judicially defined in numerous

cases. It was felt that an express statutory definition would probably fail to match the existing concept and would therefore provide difficulty rather than certainty.

**Ordinary residence - partnerships**

**8.** A partnership is ordinarily resident in [*enacting province or territory*], for the purposes of this Part, only if

(a) the partnership has, or is required by law to have, a registered office or business address in [*enacting province or territory*],

(b) it has a place of business in [*enacting province or territory*], or

(c) its central management is exercised in [enacting province or territory].

**COMMENT TO SECTION 8.**

8.1. See comment 7.1. Partnerships are both business entities and collections of individuals. This section defines the ordinary residence of a partnership in a business sense, is analogous to the section 5 provisions on corporations, and excludes territorial competence over the partnership based on the residence of an individual partner alone.

**Ordinary residence - unincorporated associations**

**9.** An unincorporated association is ordinarily resident in [*enacting province or territory*] for the purposes of this Part, only if

(a) an officer of the association is ordinarily resident in [enacting province or territory], or

(b) the association has a location in [enacting province or territory] for the purpose of conducting its activities.

**COMMENT TO SECTION 9.**

9.1. See comment 7.1.

**Real and substantial connection**

**10.** Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [*enacting province or territory*] and the facts on which a proceeding is based, a real and substantial connection between [*enacting province or territory*] and those facts is presumed to exist if the proceeding

(a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in [*enacting province or territory*],

(b) concerns the administration of the estate of a deceased person in relation to

(i) immovable property of the deceased person in [*enacting province or territory*], or

(ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in [*enacting province or territory*],

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to

(i) immovable or movable property in [*enacting province or territory*], or

(ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in [*enacting province or territory*],

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include immovable or movable property in [*enacting province or territory*] and the relief claimed is only as to that property;

(ii) that trustee is ordinarily resident in [*enacting province or territory*];

(iii) the administration of the trust is principally carried on in [*enacting province or territory*];

(iv) by the express terms of a trust document, the trust is governed by the law of [*enacting province or territory*],

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in [*enacting province or territory*],

(ii) by its express terms, the contract is governed by the law of [*enacting province or territory*], or

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in [*enacting province or territory*] by or on behalf of the seller,

(f) concerns restitutionary obligations that, to a substantial extent, arose in [*enacting province or territory*],

(g) concerns a tort committed in [*enacting province or territory*],

(h) concerns a business carried on in [*enacting province or territory*],

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in [*enacting province or territory*], or

(ii) in relation to immovable or movable property in [*enacting province or territory*],

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in [*enacting province of territory*],

(k) is for enforcement of a judgment of a court made in or outside [*enacting province or territory*] or an arbitral award made in or outside [*enacting province or territory*], or

(l) is for the recovery of taxes or other indebtedness and is brought by the Crown [*of the enacting province or territory*] or by a local authority [*of the enacting province or territory*].

**COMMENT TO SECTION 10.**

10.1. The purpose of section 10 is to provide guidance to the meaning of "real and substantial connection" in paragraph 3(e). Instead of having to show in each case that a real and substantial connection exists, plaintiffs will be able, in the great majority of cases, to rely on one of the presumptions in section 10. These are based on the grounds for service *ex juris* in the rules of court of many provinces. If the defined connection with the enacting jurisdiction exists, it is presumed to be sufficient to establish territorial competence under paragraph 3(e).

10.2. A defendant will still have the right to rebut the presumption by showing that, in the facts of the particular case, the defined connection is not real and substantial. Conversely, a plaintiff whose claim does not fall within any of the paragraphs of section 10 will have the right to argue that the facts of the particular case do have a real and substantial connection with the enacting jurisdiction so as to give its courts territorial competence under paragraph 3(e). For example, a plaintiff may argue that the "place of contracting" is such a significant factor in a contract action that the forum in which the contract was formed should exercise territorial competence. In many cases, questions of validity and performance arise at the same time and are intermingled. In an appropriate case, where only the question of formal validity of a contract is an issue, it would open to the plaintiff to argue that the court should take jurisdiction even though the plaintiff cannot invoke the presumption set out for other factors.

10.3. One common ground for service *ex juris* is not found among the presumed real and substantial connections in section 10, namely, that the defendant is a necessary or proper party to an action brought against a person served in the jurisdiction. The reason is that such a rule would be out of place in provisions that are based, not on service, but on substantive connections between the proceeding and the enacting jurisdiction. If a plaintiff wishes to bring proceedings against two defendants, one of whom is ordinarily resident in the enacting jurisdiction and the other of whom is not, territorial competence over the first defendant will be present under paragraph 3(d). Territorial competence over the second defendant will not be presumed merely on the ground that that person is a necessary or proper party to the proceeding against the first person. The proceeding against the second person will have to meet the real and substantial connection test in paragraph 3(e).

Section 4.1, residual discretion, also provides a basis upon which jurisdiction can be exercised over a necessary and proper party who cannot be caught under the normal rules. A plaintiff seeking to bring in such a party would argue first, that there is a real and substantial connection between the territory and the party, or secondly that there is no other forum in which the plaintiff can or can reasonably be required to seek relief against that party.

10.4. Section 10 does not include any presumptions relating to proceedings concerned with family law. Since territorial competence in these proceedings is usually governed by special statutes, it was felt that express rules in section 10 would lead to confusion and uncertainty because they would often be at variance with the rules in those statutes, which may have priority by virtue of section 10. For this reason it was felt better to leave the matter of territorial competence for the special family law statutes. If the question of territorial competence in a particular family matter was not dealt with in a special statute, the general rules in section 3 of this Act, including ordinary residence and real and substantial connection, would govern.

10.5 Section 8 lists only those factors which give rise to the presumption. Factors such as "the defendant has property within the Province" which now exist as a basis for service ex juris, are deliberately excluded from the list and the operation of the presumption.

**Discretion as to the exercise of territorial competence**

**11.** (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside [*enacting province or territory*] is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

COMMENTS TO SECTION 11.

11.1. Section 11 is meant to codify the doctrine of *forum non conveniens*, which was most recently confirmed by the Supreme Court of Canada in *Amchem Products Inc.* v. *British Columbia* (1993). The language of subsection 11(1) is taken from *Amchem* and the earlier cases on which it was based. The factors listed in subsection 11(2) as relevant to the court's discretion are all factors that have been expressly or implicitly considered by courts in the past.

11.2. The discretion in section 11 to decline the exercise of territorial competence is defined without reference to whether a defendant was served in the enacting jurisdiction or *ex juris*. This is consistent with the approach in Part 2 as a whole, which renders the place of service irrelevant to the substantive rules of jurisdiction. It is also consistent with the Supreme Court's statement in the *Amchem* case that there was no reason in principle to differentiate between declining jurisdiction where service was in the jurisdiction and where it was *ex juris*.

**[Conflicts or inconsistencies with other Acts**

**12.** If there is a conflict or inconsistency between this Part and another Act of [*enacting province or territory*] or of Canada that expressly

(a) confers jurisdiction or territorial competence on a court, or

(b) denies jurisdiction or territorial competence to a court, that other Act prevails.]

COMMENT TO SECTION 12.

12.1. This section is square bracketed so that the enacting jurisdiction will consider the following matters. The Uniform Act is intended to be a comprehensive statement of the substantive law of Court Jurisdiction. The statute codifies the rules and is looked to as the source of those rules. Exceptions clearly compromise that comprehensiveness. However, there may be special provisions, particularly in the family law area, which are inconsistent with the Act and are to be preserved. Those statutes can be listed specifically as exceptions to the operation of the Act. As a last resort, where an enacting jurisdiction cannot specifically list the exceptions, but is convinced that they exist, this section may be included.

12.2. As noted above (comment 2.1), section 12, if enacted, preserves any limitation or extension of the territorial competence of a particular court that is provided, either expressly by implication, in another statute.

## PART 3 : TRANSFER OF A PROCEEDING

**[Note: For "[*superior court*]" throughout this Part, each [*enacting province or territory*] will substitute the name of its court of unlimited trial jurisdiction]**

**General provisions applicable to transfers**

**13.** (1) The [*superior court*], in accordance with this Part, may

(a) transfer a proceeding to a court outside [*enacting province or territory*], or

(b) accept a transfer of a proceeding from a court outside [*enacting province or territory*].

(2) A power given under this part to the [*superior court*] to transfer a proceeding to a court outside [*enacting province or territory*] includes the power to transfer part of the proceeding to that court.

(3) A power given under this Part to the [*superior court*] to accept a proceeding from a court outside [*enacting province or territory*] includes the power to accept part of the proceeding from that court.

(4) If anything relating to a transfer of a proceeding is or ought to be done in the [*superior court*] or in another court of [*enacting province or territory*] on appeal from the [*superior court*], the transfer is governed by the provisions of this Part.

(5) If anything relating to a transfer of a proceeding is or ought to be done in a court outside [*enacting province or territory*], the [*superior court*], despite any differences between this Part and the rules applicable in the court outside [*enacting province or territory*], may transfer or accept a transfer of the proceeding if the [*superior court*] considers that the differences do not

(a) impair the effectiveness of the transfer, or

(b) inhibit the fair and proper conduct of the proceeding.

COMMENTS TO SECTION 13.

13.1. Part 3 sets up a mechanism through which the superior court of general jurisdiction in the enacting province or territory can - acting in cooperation with a court of another province, territory or state - move a proceeding out of a court that is not an appropriate forum into a court that is a more appropriate forum. Under current law, if a court thinks the proceeding would be more appropriately heard in a different court, its only option is to decline jurisdiction and force the plaintiff to recommence the proceeding in the other court if the plaintiff wishes and is able to do so. The transfer mechanism would accomplish the same purpose more directly, by preserving whatever has already been done in the old forum and simply continuing the

proceeding in the new forum. It is therefore designed to avoid waste, duplication, and delay.

13.2. The present draft Act, like the Uniform Transfer of Litigation Act (UTLA) promulgated by the Uniformity Commissioners in the United States, allows for transfers not only to and from courts within Canada but also to and from courts in foreign nations. There was extensive debate at the Conference on whether this was appropriate. Two principal arguments were made against it. First, Canadian courts should not, it was argued, be given the power to relegate litigants to foreign legal systems that might be very different from our own, where the standards of justice might not be comparable, and which could not be openly evaluated by a Canadian court without the risk of embarrassment to Canada. Secondly, cooperation between a Canadian court and a foreign court should not be possible in the absence of authorization, in a treaty, by the two nations involved.

The primary response made to the first argument was that the transfer mechanism could not force a litigant into a foreign legal system any more than the present law does. It will nearly always be a plaintiff who is forced to accept a transfer. There is no practical difference between a plaintiff being "forced" into a foreign court by means of a stay of Canadian proceedings, as the current law allows, and being "forced" there by a transfer. Arguments about the suitability of the foreign court, and the likelihood of justice being done there, can arise under the present system just as they could under the transfer mechanism. And, of course, plaintiffs can never be "forced" to pursue the proceeding in another court if they do not wish to do so. In a small minority of cases it may be, not the plaintiff, but the defendant (or a third party) who is "forced" into a foreign court by a transfer (for example, at the behest of a co-defendant). Even in those cases there is no practical difference, in terms of the effect on the defendant's rights, between being transferred into the foreign court and being sued there in the first place.

As for the second argument, the main response was that the proposed transfer mechanism did not by-pass the proper route of a treaty any more than do the present uniform statutes on the reciprocal enforcement of judgments and of maintenance orders. These result in the enforcement of foreign court orders in Canada, and vice-versa, through the combined operation of foreign and Canadian court systems, each operating by authority of the legislature in its jurisdiction.

It was also argued, in support of the present scope of the draft, that a transfer mechanism would be much more valuable if it allowed a Canadian court to request transfers to, and accept transfers from, courts in the United States and elsewhere. In each case the Canadian court would have a completely free discretion to decide whether the ends of justice would be served by requesting the outbound transfer or accepting the inbound transfer.

The Conference, by a majority, decided not to restrict the present draft Act to transfers within Canada.

13.3. Section 13 provides the framework for all the other provisions of Part 3. Whether the transfer is from the domestic court to the extraprovincial court (paragraph

13(1)(a)) or from an extraprovincial court to the domestic court (paragraph 13(1)(b)), the Act only purports to regulate those aspects of the transfer that relate to the domestic court (or a court on appeal from the domestic court, referred to in subsection 13(4)). The provisions of Part 3 are drafted so that they do not purport to lay down any rules for the courts of the other jurisdiction that is involved in the transfer. It may be that the other jurisdiction's rules for accepting or initiating transfers differ from those in the present Act. In that event, subsection 13(5) provides that the domestic court can transfer (i.e. initiate the transfer) to, or accept a transfer from, the other jurisdiction if the differences do not impair the effectiveness of the transfer or the fairness of the proceeding.

**Grounds for an order transferring a proceeding**

**14.** (1) The [*superior court*] by order may request a court outside [*enacting province or territory*] to accept a transfer of a proceeding in which the [*superior court*] has both territorial and subject matter competence if [*superior court*] is satisfied that

(a) the receiving court has subject matter competence in the proceeding, and

(b) under section 13, the receiving court is a more appropriate forum for the proceeding than the [*superior court*].

(2) The [*superior court*] by order may request a court outside [*enacting province or territory*] to accept a transfer of a proceeding, in which the [*superior court*] lacks territorial or subject matter competence if the [*superior court*] is satisfied that the receiving court has both territorial and subject matter competence in the proceeding.

(3) In deciding whether a court outside [*enacting province or territory*] has territorial or subject matter competence in a proceeding, the [*superior court*] must apply the laws of the state in which the court outside [*enacting province or territory*] is established.

COMMENTS TO SECTION 14.

14.1. A key feature of the transfer provisions, which is taken from UTLA, is a transfer may be made so long as *either* the transferring or the receiving court has territorial competence over the proceeding. The receiving court must always have subject matter competence; in other words it cannot, by virtue of a transfer, acquire jurisdiction to hear a type of case that it usually has no jurisdiction to entertain. But it can, by virtue of a transfer, hear a case over which it would not otherwise have territorial competence, so long as the court that initiated the transfer did have territorial competence. It should be noted in this connection that all that Part 3 does is to make a transfer to the receiving court possible. It does not guarantee that the receiving court's eventual judgment will be recognized in the transferring court - or anywhere else - as binding on a party who refuses to take part in the continued proceeding in the receiving court. As a practical matter, a transferring court would

be most unlikely to grant the application for a transfer in the first place, if it appeared that the outcome might be a judgment that was unenforceable against a party opposing the transfer.

14.2. Subsection 14(1) deals with an outbound transfer where the domestic court has territorial as well as subject matter competence. The receiving court need only have subject matter competence, and be a more appropriate forum under the principles in section 11.

14.3. Subsection 14(2) authorizes an outbound transfer where the domestic court lacks territorial or subject matter competence, but the receiving court is possessed of both.

14.4. In relation to subsection 14(2), it may seem curious that a court that *lacks* competence to hear the case can nevertheless "bind" the parties by requesting a transfer. In reality, however, the transferring court's request does not "bind" anyone. It only sets in motion a process whereby the receiving court can agree to take the proceeding. It is the receiving court's acceptance of the transfer that "binds" the parties - which, since it has full competence (under its own rules - subsection 14(3)), is no more than that court could have done if the proceeding had originally started there.

**Provisions relating to the transfer order**

**15.** (1) In an order requesting a court outside [*enacting province or territory*] to accept a transfer of a proceeding, the [*superior court*] must state the reasons for the request.

(2) The order may

(a) be made on application of a party to the proceeding,

(b) impose conditions precedent to the transfer,

(c) contain terms concerning the further conduct of the proceeding, and

(d) provide for the return of the proceeding to the [*superior court*] on the occurrence of specified events.

(3) On its own motion, or if asked by the receiving court, the [*superior court*], on or after making an order requesting a court outside [*enacting province or territory*] to accept a transfer of a proceeding, may

(a) send to the receiving court relevant portions of the record to aid that court in deciding whether to accept the transfer or to supplement material previously sent by the [*superior court*] to the receiving court in support of the order, or

(b) by order, rescind or modify one or more terms of the order requesting acceptance of the transfer.

COMMENTS TO SECTION 15.

15.1. Section 15 deals with the order of the superior court of the enacting jurisdiction, requesting another court to accept a transfer. Rules of court will provide the procedure for a party to apply for a transfer, as referred to by paragraph 15(2)(a). The rules of court will also deal with matters such as notice to the other parties and the opportunity to be heard.

15.2. The superior court is free to attach whatever conditions it thinks fit to the request for a transfer. These may be conditions precedent to the transfer's taking place (paragraph 15(2)(b)) or terms as to the further conduct of the proceeding (paragraph 15(2)(c)). The superior court may also stipulate that the proceeding is to return to it on the occurrence of certain events (paragraph 15(2)(c)). The receiving court is free to accept or refuse the transfer on those conditions. Subsection 15(3) contemplates that the receiving court may ask the superior court if it will modify a term of the transfer as requested, and gives the superior court the power to do so.

**[*Superior court's*] discretion to accept or refuse a transfer**

**16.** (1) After the filing of a request made by a court outside [*enacting province or territory*] to transfer to the [*superior court*] a proceeding brought against a person in the transferring court, the [*superior court*] by order may

(a) accept the transfer, subject to subsection (4), if both of the following requirements are fulfilled:

(i) either the [*superior court*] or the transferring court has territorial competence in the proceeding;

(ii) the [*superior court*] has subject matter competence in the proceeding, or

(b) refuse to accept the transfer for any reason that the [*superior court*] considers just, regardless of the fulfillment of the requirements of paragraph (a).

(2) The [*superior court*] must give reasons for an order under subsection (1) (b) refusing to accept the transfer of a proceeding.

(3) Any party to the proceeding brought in the transferring court may apply to the [*superior court*] for an order accepting or refusing the transfer to the [*superior court*] of the proceeding.

(4) The [*superior court*] may not make an order accepting the transfer of a proceeding if a condition precedent to the transfer imposed by the transferring court has not been fulfilled.

COMMENTS TO SECTION 16.

16.1. Section 16 provides for the superior court's response to a request to accept a transfer from another court. It may accept the inbound transfer, provided that it is satisfied that the requirements of territorial and subject matter competence are satisfied. Those requirements, contained in paragraph 16(1)(a), parallel those in section 16 dealing with the superior court's requesting an outbound transfer. Either the transferring court or the (receiving) superior court must have territorial competence, and the superior court must have subject matter competence.

16.2. The superior court is completely free to refuse the transfer even if the requirements of territorial and subject matter competence are met (paragraph 16(1)(b)), but must give reasons for doing so (subsection 16(2)).

16.3. Rules of court will supplement the provision in subsection 16(3) under which a party may apply to the superior court to have it accept or refuse a transfer.

16.4. If a condition precedent to the transfer, as set by the transferring court, is not fulfilled the superior court may not accept the transfer (subsection 16(4)). It would need to ask the transferring court to modify or remove the condition precedent, as contemplated (for outbound transfers) in paragraph 15(3)(b).

**Effect of transfers to or from [superior court]**

**17.** A transfer of a proceeding to or from the [*superior court*] takes effect for all purposes of the law of [*enacting province or territory*] when an order made by the receiving court accepting the transfer is filed in the transferring court.

COMMENTS TO SECTION 15.

17.1. The time when a transfer - whether inbound or outbound - takes effect is critical to the operation of sections 18 to 23.

**Transfers to courts outside [enacting province or territory]**

**18.** (1) On a transfer of a proceeding from the [*superior court*] taking effect,

(a) the [*superior court*] must send relevant portions of the record, if not sent previously, to the receiving court, and

(b) subject to section 17 (2) and (3), the proceeding continues in the receiving court.

(2) After the transfer of a proceeding from the [*superior court*] takes effect, the [*superior court*] may make an order with respect to a procedure that was pending in the proceeding at the time of the transfer only if

(a) it is unreasonable or impracticable l for a party to apply to the receiving court for the order, and

(b) the order is necessary for the fair and proper conduct of the proceeding in the receiving court.

(3) After the transfer of a proceeding from the [*superior court*] takes effect, the [*superior court*] may discharge or amend an order made in the proceeding before the transfer took effect only if the receiving court lacks territorial competence to discharge or amend the order.

**COMMENTS TO SECTION 18.**

See the comments to section 19.

**Transfers to [superior court]**

**19.** (1) On a transfer of a proceeding to the [*superior court*] taking effect, the proceeding continues in the [*superior court*].

(2) A procedure completed in a proceeding in the transferring court before transfer of the proceeding to the [*superior court*] has the same effect in the [*superior court*] as in the transferring court, unless the [*superior court*] otherwise orders.

(3) If a procedure is pending in a proceeding at the time of the transfer of the proceeding to the [*superior court*] takes effect, the procedure must be completed in the [*superior court*] in accordance with the rules of the transferring court, measuring applicable time limits as if the procedure had been initiated 10 days after the transfer took effect, unless the [*superior court*] otherwise orders.

(4) After the transfer of a proceeding to the [*superior court*] takes effect, the [*superior court*] may discharge or amend an order made in the proceeding by the transferring court.

(5) An order of the transferring court that is in force at the time the transfer of a proceeding to the [*superior court*] takes effect remains in force after the transfer until discharged or amended by

(a) the transferring court, if the [*superior court*] lacks territorial competence to discharge or amend the order, or

(b) the [*superior court*], in any other case.

**COMMENTS TO SECTION 19.**

19.1. An instantaneous transfer, in all respects, of a legal proceeding from one court to another would be ideal but obviously cannot be fully realized in practice. Sections 18 and 19 deal with the procedures that are completed before the transfer, procedures that are pending at the time of transfer, and orders that have been made before the transfer takes effect.

19.2. Subsection 18(1)(b) and subsection 19(1) define the effect of a transfer for, respectively, outbound and inbound transfers: the proceeding continues in the receiving court.

19.3. A procedure that is completed before the transfer takes effect is simply given the same effect in the receiving court as it had in the transferring court, subject to the receiving court's right to change that effect (subsection 19(2)). (There is no need for an equivalent for outbound transfers.)

19.4. If a procedure is pending at the time a transfer takes effect, the transferring court retains power to make an order in respect of that procedure only in the limited circumstances defined in subsection 18(2) (for outbound transfers). The general rule is that the procedure must be completed in the receiving court. Subsection 19(3) provides (for inbound transfers) that it must be completed according to the rules of the transferring court and that relevant time limits run from 10 days after the transfer takes effect unless the court orders otherwise.

19.5. An order made before the transfer takes effect continues in effect until the receiving court discharges or amends it (subsections 19(4) and (5) for inbound transfers). The transferring court has no power to discharge or amend such an order unless the receiving court lacks the territorial competence to do so (subsection 18(3), for outbound transfers, and paragraph 19(5)(a) for inbound transfers). The latter situation might arise, for example, with respect to injunctions relating to things to be done or not done in the territory of the transferring court.

**Return of a proceeding after transfer**

**20.** (1) After the transfer of a proceeding to the [*superior court*] takes effect, the [*superior court*] must order the return of the proceeding to the court from which the proceeding was received if

(a) the terms of the transfer provide for the return,

(b) both the [*superior court*] and the court from which the proceeding was received lack territorial competence in the proceeding, or

(c) the [*superior court*] lacks subject matter competence in the proceeding.

(2) If a court to which the [*superior court*] has transferred a proceeding orders that the proceeding be returned to the [*superior court*] in any of the circumstances referred to in subsection (1) (a), (b) or (c), or in similar circumstances, the [*superior court*] must accept the return.

(3) When a return order is filed in the [*superior court*], the returned proceeding continues in the [*superior court*].

**COMMENTS ON SECTION 20.**

20.1. A return of a transfer may be necessary for two reasons. The terms of the original order requesting the transfer may require the return if certain events occur

(paragraph 20(1)(a), dealing with the return of inbound transfers; compare paragraph 15(2)(c), giving power to impose such terms in outbound transfers). Or it may appear, after the receiving court has accepted the transfer, that the transfer was in fact unauthorized because a requirement of territorial or subject matter competence was not satisfied (paragraphs 20(1)(b) and (c), dealing with the return of inbound transfers).

20.2. A return may not be refused by the court to which the proceeding is returned (subsection 20(2), dealing with the return of outbound transfers), because the receiving court cannot retain the proceeding and the only place the proceeding can therefore be located is the transferring court. If that court lacks territorial or subject matter competence over the proceeding, the return of the proceeding may be simply for the purposes of dismissal.

**Appeals**

**21.** (1) After the transfer of a proceeding to the [*superior court*] takes effect, an order of the transferring court, except the order requesting the transfer, may be appealed in [*enacting province or territory*] with leave of the court of appeal of the receiving court as if the order had been made by the [*superior court*].

(2) A decision of a court outside [*enacting province or territory*] to accept the transfer of a proceeding from the [*superior court*] may not be appealed in [*enacting province or territory*].

(3) If, at the time that the transfer of a proceeding from the [*superior court*] takes effect, an appeal is pending in [*enacting province or territory*] from an order of the [*superior court*], the court in which the appeal is pending may conclude the appeal only if

(a) it is unreasonable or impracticable l for the appeal to be recommenced in the state of the receiving court, and

(b) a resolution of the appeal is necessary for the fair and proper conduct of the continued proceeding in the receiving court.

**COMMENTS TO SECTION 21.**

21.1. Some provinces do not require leave to appeal in respect of interlocutory orders. For those provinces, the section introduces a leave requirement in a small defined class of cases, namely, interlocutory orders granted before the transfer order takes effect. Such orders can be appealed in the receiving court only if leave of the Court of Appeal of the receiving court is obtained. An interlocutory order granted by the receiving court, after the transfer order, may be appealed in the normal manner appropriate to the appeal of interlocutory orders in that province or territory.

21.2. Section 21, like sections 18 and 19, deals with a practical difficulty when a transfer takes effect. In principle, consistently with the policy of a complete continuance of the proceeding in the receiving court, appeals from any order made in the

proceeding must be taken there (subsection 21(1), dealing with inbound transfers). The order requesting the transfer, however, can be appealed only in the transferring court, not the receiving court (the exception in subsection 21(1)). Likewise, the order accepting the transfer can be appealed only in the receiving court, not the transferring court (subsection 21(2), dealing with outbound transfers).

21.3. Pending appeals raise the same kind of difficulty as the pending procedures dealt with by subsections 18(2) and 19(3). The solution adopted in subsection 21(3) (dealing with outbound transfers) is the same as that adopted in those sections for pending procedures, namely, that the appeal court in the transferring jurisdiction should be able to complete an appeal if, and only if, that is a practical necessity.

**Departure from a term of transfer**

**22.** After the transfer of a proceeding to the [*superior court*] takes effect, the [*superior court*] may depart from terms specified by the transferring court in the transfer order, if it is just and reasonable to do so.

**COMMENT TO SECTION 22.**

22.1. Once a transfer has taken effect, it is appropriate to give the receiving court a discretion to depart from terms specified in the transfer order by the transferring court. Circumstances may arise that the transferring court had not anticipated, or the terms in its transfer order may turn out to be impractical, or the parties may agree on the alteration of a term of the transfer.

**Limitations and time periods**

**23.** (1) In a proceeding transferred to the [*superior court*] from a court outside [*enacting province or territory*], and despite any enactment imposing a limitation period, the [*superior court*] must not hold a claim barred because of a limitation period if

(a) the claim would not be barred under the limitation rule that would be applied by the transferring court, and

(b) at the time the transfer took effect, the transferring court had both territorial and subject matter competence in the proceeding.

(2) After a transfer of a proceeding to the [*superior court*] takes effect, the [*superior court*] must treat a procedure commenced on a certain date in a proceeding in the transferring court as if the procedure had been commenced in the [*superior court*] on the same date.

**COMMENTS TO SECTION 23.**

23.1. Subsection 23(1), dealing with inbound transfers, ensures that a limitation defence that would have been unavailable in the transferring court cannot be invoked in the

receiving court after the transfer takes effect. The rule is limited to cases where the transferring court could itself have heard the case; in other words, where it had both territorial and subject matter competence.

23.2. Subsection 23(2), also dealing with inbound transfers, is needed so that the sequence of dates on which procedures were commenced in the transferring court is preserved intact after the transfer takes effect. If, however, a procedure is pending at the time of transfer, the special rule of subsection 19(3) applies to determine the time when the procedure must be completed.